



# Federal Register

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Proclamation 7771 of April 13, 2004

The President

Pan American Day and Pan American Week, 2004

By the President of the United States of America

## A Proclamation

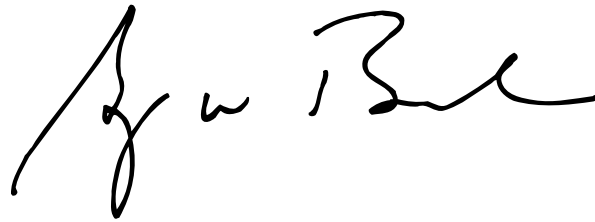
Each year on Pan American Day and during Pan American Week, we honor the bonds of friendship that unite the Pan American community. With the exception of one country, the nations of the Western Hemisphere recognize the importance of working together to strengthen democratic institutions, promote economic prosperity, invest in our people, and improve our security. At the recent 2004 Special Summit of the Americas, the 34 democratic nations of the Western Hemisphere reaffirmed their commitment to the Inter-American Democratic Charter to defend democracy and freedom whenever they are threatened. Our unity and support of democratic institutions, constitutional processes, and basic liberties give hope and strength to those struggling around the world.

The nations of the Western Hemisphere will continue to draw upon the Charter to strengthen the rule of law, protect human rights and freedoms, encourage economic growth, and promote good governance. As neighbors, we are expanding prosperity through open markets and economic reforms—creating new opportunities for millions of people and continued economic progress benefiting the nations of our hemisphere. My Administration will continue to work toward the creation of the Free Trade Area of the Americas, scheduled for completion in 2005.

To protect the rights and freedoms of all our citizens, the Pan American community must also combat the forces that threaten democracy: terrorism, drug trafficking, and other crimes that transcend national borders. The Declaration on Security in the Americas, adopted at the October 2003 Organization of American States Special Conference on Security, underscores our hemisphere's interest in collectively maintaining peace and security across the Americas. The United States welcomes the opportunity to work with our neighbors to advance the Declaration's goals to safeguard our citizens as we build for a future that is peaceful, just, and prosperous.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim April 14, 2004, as Pan American Day and April 11 through April 17, 2004, as Pan American Week. I urge the Governors of the 50 States, the Governor of the Commonwealth of Puerto Rico, and the officials of other areas under the flag of the United States of America to honor these observances with appropriate ceremonies and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this thirteenth day of April, in the year of our Lord two thousand four, and of the Independence of the United States of America the two hundred and twenty-eighth.

A handwritten signature in black ink, appearing to read "G. W. Bush". The signature is fluid and cursive, with the first name "G." and last name "Bush" clearly distinguishable.

[FR Doc. 04-8834

Filed 4-15-04; 8:45 am]

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# Rules and Regulations

Federal Register

Vol. 69, No. 74

Friday, April 16, 2004

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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. 2003-NE-44-AD; Amendment 39-13569; AD 2004-07-25]

RIN 2120-AA64

#### Airworthiness Directives; Hartzell Propeller Inc. Models HC-B5MP-3C/M10876K Propellers

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

**SUMMARY:** The FAA is superseding an existing airworthiness directive (AD) for Hartzell Propeller Inc. Model HC-B5MP-3C/M10876K propellers, installed on Short Brothers Model SD3-60 airplanes. That AD currently requires initial and repetitive removal, disassembly, inspection, and rework if necessary of Hartzell Propeller Inc. Model HC-B5MP-3C/M10876K propellers until blades are replaced with new design blades, no later than March 31, 1988. This AD requires installation of new design blades before further flight, on Hartzell Propeller Inc. Models HC-B5MP-3C/M10876K propellers. This AD superseding is prompted by a review of all currently effective ADs, which found that AD 87-16-02 was not published in the **Federal Register** to make it effective to all operators, as opposed to just the operators who received actual notice of the original AD. We are issuing this AD to prevent propeller blade separation near the hub, which could result in engine separation from the airplane.

**DATES:** This AD becomes effective May 21, 2004.

**ADDRESSES:** You may examine the AD docket, by appointment, at the FAA, New England Region, Office of the

Regional Counsel, 12 New England Executive Park, Burlington, MA.

#### FOR FURTHER INFORMATION CONTACT:

Melissa Bradley, Aerospace Engineer, Chicago Aircraft Certification Office, FAA, Small Airplane Directorate, 2300 East Devon Avenue, Des Plaines, IL 60018; telephone: (847) 294-8110; fax: (847) 294-7834.

**SUPPLEMENTARY INFORMATION:** The FAA proposed to amend 14 CFR part 39 with a proposed airworthiness directive (AD). The proposed AD applies to Hartzell Propeller Inc. Model HC-B5MP-3C/M10876K propellers. We published the proposed AD in the **Federal Register** on October 16, 2003 (68 FR 59555). That action proposed to require installation of new design blades before further flight, on Hartzell Propeller Inc. Models HC-B5MP-3C/M10876K propellers.

#### Comments

We provided the public the opportunity to participate in the development of this AD. We received no comments on the proposal or on the determination of the cost to the public.

#### Conclusion

We have carefully reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed.

#### Changes to 14 CFR Part 39—Effect on the AD

On July 10, 2002, we issued a new version of 14 CFR part 39 (67 FR 47998, July 22, 2002), which governs the FAA's AD system. That regulation now includes material that relates to altered products, special flight permits, and alternative methods of compliance. The material previously was included in each individual AD. Since the material is included in 14 CFR part 39, we will not include it in future AD actions.

#### Regulatory Findings

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

(1) Is not a "significant regulatory action" under Executive Order 12866;

(2) Is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a summary of the costs to comply with this AD and placed it in the AD Docket. You may get a copy of this summary by sending a request to us at the address listed under **ADDRESSES**. Include "AD Docket No. 2003-NE-44-AD" in your request.

#### List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

#### Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the Federal Aviation Administration amends 14 CFR part 39 as follows:

#### PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40113, 44701.

#### § 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding a new airworthiness directive, Amendment 39-13569, to read as follows:

#### 2004-07-25 Hartzell Propeller Inc.:

Amendment 39-13569. Docket No. 2003-NE-44-AD. Supersedes Priority Letter AD 87-16-02.

#### Effective Date

(a) This AD becomes effective May 21, 2004.

#### Affected ADs

(b) This AD supersedes Priority Letter AD 87-16-02.

#### Applicability

(c) This AD applies to Hartzell Propeller Inc. Model HC-B5MP-3C/M10876K propellers. These propellers are installed on, but not limited to, Short Brothers Model SD3-60 airplanes.

#### Unsafe Condition

(d) This AD is prompted by a review of all currently effective ADs, which found that AD 87-16-02 was not published in the **Federal Register** to make it effective to all operators, as opposed to just the operators who received actual notice of the original AD. We are issuing this AD to prevent propeller blade

separation near the hub, which could result in engine separation from the airplane.

#### Compliance

(e) You are responsible for having the actions required by this AD performed within the compliance times specified unless the actions have already been done.

#### Required Actions

(f) Before further flight, replace propeller blades Model M10876K with blades Model M10876ASK.

(g) After the effective date of this AD, do not install propeller blades Model M10876K on any airplane.

#### Alternative Methods of Compliance

(h) The Manager, Chicago Aircraft Certification Office, has the authority to approve alternative methods of compliance for this AD if requested using the procedures found in 14 CFR 39.19.

#### Material Incorporated by Reference

(i) None.

#### Related Information

(j) None.

Issued in Burlington, Massachusetts, on March 30, 2004.

**Francis A. Favara,**

*Acting Manager, Engine and Propeller Directorate, Aircraft Certification Service.*  
[FR Doc. 04-8585 Filed 4-15-04; 8:45 am]

BILLING CODE 4910-13-P

## DEPARTMENT OF DEFENSE

### Department of the Navy

#### 32 CFR Part 719

RIN 0703-AA75

#### Regulations Supplementing the Manual for Courts-Martial

**AGENCY:** Department of the Navy, DOD.  
**ACTION:** Final rule.

**SUMMARY:** The Department of the Navy is amending its regulations concerning the closure of pre-trial hearings from the public to reflect recent changes to Chapter I of the Manual of the Judge Advocate General (JAGMAN).

**DATES:** Effective April 16, 2004.

**FOR FURTHER INFORMATION CONTACT:** LCDR Jason Baltimore, Personnel Law Branch, Administrative Law Division (Code 13), Office of the Judge Advocate General, 1322 Patterson Avenue SE., Suite 3000, Washington Navy Yard, DC 20374-5066, (703) 604-8208.

**SUPPLEMENTARY INFORMATION:** Pursuant to the authority cited below, the Department of the Navy amends 32 CFR part 719. This amendment provides notice that the Judge Advocate General of the Navy has made administrative

corrections to the Courts-Martial regulations found in Chapter I of the JAGMAN. It has been determined that invitation of public comment on this amendment would be impractical and unnecessary, and is therefore not required under the public rule-making provisions of 32 CFR parts 336 and 701. However, interested persons are invited to comment in writing on this amendment. All written comments received will be considered in making subsequent amendments or revisions of 32 CFR part 719, or the instructions on which they are based. It has been determined that this final rule is not a major rule within the criteria specified in Executive Order 12866, as amended by Executive Order 13258, and does not have substantial impact on the public. This submission is a statement of policy and as such can be effective upon publication in the **Federal Register**.

#### Matters of Regulatory Procedure

##### *Executive Order 12866, Regulatory Planning and Review*

This rule does not meet the definition of "significant regulatory action" for purposes of Executive Order 12866, as amended by Executive Order 13258.

##### *Regulatory Flexibility Act*

This rule will not have a significant economic impact on a substantial number of small entities for purposes of the Regulatory Flexibility Act (5 U.S.C. Chapter 6).

##### *Paperwork Reduction Act*

This rule does not impose collection of information requirements for purposes of the Paperwork Reduction Act (44 U.S.C. Chapter 35, 5 CFR part 1320).

#### List of Subjects in 32 CFR Part 719

Trial Matters.

■ For the reasons set forth in the preamble, 32 CFR Part 719 is amended to read as follows:

■ 1. Section 719.115 is amended by revising paragraph (b)(2) to read as follows:

##### **§ 719.115 Release of information pertaining to accused persons; spectators at judicial sessions.**

\* \* \* \* \*

(b) \* \* \*

(2) At pretrial investigations. Consistent with Rules for Courts-Martial 405(h)(3), Manual for Courts-Martial, the Convening Authority or investigating officer may direct that all or part of an Article 32 investigation under 10 U.S.C. 832 be held in closed session and that all persons not connected with the hearing be excluded

therefrom. The decision to exclude spectators may be based on the need to protect classified information, to prevent disclosure of matters that will be inadmissible in evidence at a subsequent trial by Courts-Martial and are of such a nature as to interfere with a fair trial by an impartial tribunal, or consistent with appellate case law, for a reason deemed appropriate by the commander ordering the investigation or the investigating officer. The reasons for closing an Article 32 investigation, and any objections thereto, shall be memorialized and included as an attachment to the report of investigation. Ordinarily, the proceedings of a pretrial investigation should be open to spectators. In cases dealing with classified information, the investigating officer will ensure that any part of a pretrial investigation (e.g., rights advisement) that does not involve classified information will remain open to spectators.

\* \* \* \* \*

Dated: April 5, 2004.

**J.T. Baltimore,**

*Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Alternate Federal Register Liaison Officer.*

[FR Doc. 04-8628 Filed 4-15-04; 8:45 am]

BILLING CODE 3810-FF-P

## DEPARTMENT OF DEFENSE

### Department of the Navy

#### 32 CFR Part 725

RIN 0703-AA74

#### Release of Official Information for Litigation Purposes and Testimony by Department of the Navy Personnel

**AGENCY:** Department of the Navy, DoD.  
**ACTION:** Final rule.

**SUMMARY:** The Department of the Navy is amending its regulations concerning requests from members of the public for official Department of the Navy information in connection with litigation to reflect recent changes to Chapter VI of the Manual of the Judge Advocate General (JAGMAN).

**DATES:** Effective April 16, 2004.

**FOR FURTHER INFORMATION CONTACT:** LCDR Jason Baltimore, Personnel Law Branch, Administrative Law Division (Code 13), Office of the Judge Advocate General, 1322 Patterson Avenue SE., Suite 3000, Washington Navy Yard, DC 20374-5066, (703) 604-8208.

**SUPPLEMENTARY INFORMATION:** Pursuant to the authority cited below, the Department of the Navy amends 32 CFR

part 725. This amendment provides notice that the Judge Advocate General of the Navy has made administrative corrections to the General Litigation regulations found in Chapter VI of the JAGMAN. It has been determined that invitation of public comment on this amendment would be impractical and unnecessary, and is therefore not required under the public rule-making provisions of 32 CFR parts 336 and 701. However, interested persons are invited to comment in writing on this amendment. All written comments received will be considered in making subsequent amendments or revisions of 32 CFR part 725, or the instructions on which they are based. It has been determined that this final rule is not a major rule within the criteria specified in Executive Order 12866, as amended by Executive Order 13258, and does not have substantial impact on the public. This submission is a statement of policy and as such can be effective upon publication in the **Federal Register**.

#### Matters of Regulatory Procedure

##### *Executive Order 12866, Regulatory Planning and Review*

This rule does not meet the definition of "significant regulatory action" for purposes of Executive Order 12866, as amended by Executive Order 13258.

##### *Regulatory Flexibility Act*

This rule will not have a significant economic impact on a substantial number of small entities for purposes of the Regulatory Flexibility Act (5 U.S.C. Chapter 6).

##### *Paperwork Reduction Act*

This rule does not impose collection of information requirements for purposes of the Paperwork Reduction Act (44 U.S.C. Chapter 35, 5 CFR Part 1320).

#### List of Subjects in 32 CFR Part 725

Authority to determine and respond.

■ For the reasons set forth in the preamble, the Department of the Navy amends 32 CFR part 725 to read as follows:

#### **PART 725—RELEASE OF OFFICIAL INFORMATION FOR LITIGATION PURPOSES AND TESTIMONY BY DEPARTMENT OF NAVY PERSONNEL**

■ 1. Section 725.6 is amended by revising paragraph (c)(i) to read as follows:

##### **§ 725.6 Authority to determine and respond**

\* \* \* \* \*

(c) \* \* \*

(1) Litigation requests regarding matters assigned to the Judge Advocate General of the Navy under Navy Regulations, article 0331 (1990), shall be referred to the Deputy Assistant Judge Advocate General for General Litigation, Office of the Navy Judge Advocate General (Washington Navy Yard), 1322 Patterson Avenue, SE., Suite 3000, Washington, DC, 20374-5066, who will respond for the Judge Advocate General or transmit the request to the appropriate Deputy Assistant Judge Advocate General for response.

\* \* \* \* \*

Dated: April 5, 2004.

**J.T. Baltimore,**

*Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Alternate Federal Register Liaison Officer.*

[FR Doc. 04-8629 Filed 4-15-04; 8:45 am]

**BILLING CODE 3810-FF-P**

## **DEPARTMENT OF DEFENSE**

### **Department of the Navy**

#### **32 CFR Part 727**

**RIN 0703-AA73**

#### **Legal Assistance**

**AGENCY:** Department of the Navy, DOD.

**ACTION:** Final rule.

**SUMMARY:** The Department of the Navy is amending its regulations concerning the provision of legal assistance to military members and other persons eligible for legal assistance to reflect recent changes to Chapter VII of the Manual of the Judge Advocate General (JAGMAN).

**DATES:** Effective April 16, 2004.

#### **FOR FURTHER INFORMATION CONTACT:**

LCDR Jason Baltimore, Personnel Law Branch, Administrative Law Division (Code 13), Office of the Judge Advocate General, 1322 Patterson Avenue SE., Suite 3000, Washington Navy Yard, DC 20374-5066, (703) 604-8208.

**SUPPLEMENTARY INFORMATION:** Pursuant to the authority cited below, the Department of the Navy amends 32 CFR part 727. This amendment provides notice that the Judge Advocate General of the Navy has made administrative corrections to the Legal Assistance regulations found in Chapter XII of the JAGMAN. It has been determined that invitation of public comment on this amendment would be impractical and unnecessary, and is therefore not required under the public rule-making provisions of 32 CFR parts 336 and 701. However, interested persons are invited to comment in writing on this

amendment. All written comments received will be considered in making subsequent amendments or revisions of 32 CFR part 727, or the instructions on which they are based. It has been determined that this final rule is not a major rule within the criteria specified in Executive Order 12866, as amended by Executive Order 13258, and does not have substantial impact on the public. This submission is a statement of policy and as such can be effective upon publication in the **Federal Register**.

#### **Matters of Regulatory Procedure**

##### *Executive Order 12866, Regulatory Planning and Review*

This rule does not meet the definition of "significant regulatory action" for purposes of Executive Order 12866, as amended by Executive Order 13258.

##### *Regulatory Flexibility Act*

This rule will not have a significant economic impact on a substantial number of small entities for purposes of the Regulatory Flexibility Act (5 U.S.C. Chapter 6).

##### *Paperwork Reduction Act*

This rule does not impose collection of information requirements for purposes of the Paperwork Reduction Act (44 U.S.C. Chapter 35, 5 CFR Part 1320).

#### **List of Subjects in 32 CFR Part 727**

Legal Assistance.

■ For the reasons set forth in the preamble, the Department of the Navy amends 32 CFR Part 727 to read as follows:

#### **PART 727—LEGAL ASSISTANCE**

■ 1. Section 727.5 is revised to read as follows:

##### **§ 727.5 Persons eligible for assistance.**

Legal assistance shall be available to members of the Armed Forces of the United States and their dependents, and military personnel of allied nations serving in the United States, its territories or possessions. Legal assistance is intended primarily for the benefit of active duty personnel during active service, including reservists (and members of the National Guard) on active duty for 30 days or more. As resources permit, legal assistance may be extended to retired military personnel, their dependents, survivors of members of the Armed Forces who would be eligible were the service member alive, reservists on active duty for single periods of 29 days or less, members of Reserve Components following release from active duty under

a call or order to active duty for more than 30 days issued under a mobilization authority (as determined by the Secretary of Defense), for a period of time that begins on the date of the release and is not less than twice the length of the period served on active duty under that call or order to active duty, and in overseas areas, civilians, other than local-hire employees, who are in the employ of, serving with, or accompanying the U.S. Armed Forces, and their dependents, when and if the workload of the office renders such service feasible, and other persons authorized by the Judge Advocate General of the Navy.

Dated: April 5, 2004.

**J.T. Baltimore,**

*Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Alternate Federal Register Liaison Officer.*

[FR Doc. 04-8630 Filed 4-15-04; 8:45 am]

BILLING CODE 3810-FF-P

## DEPARTMENT OF DEFENSE

### Department of the Navy

#### 32 CFR Part 752

RIN 0703-AA72

#### Admiralty Claims

**AGENCY:** Department of the Navy, DOD.

**ACTION:** Final rule.

**SUMMARY:** The Department of the Navy is amending its regulations concerning the limit on the Secretary of the Navy's settlement authority on admiralty claims to reflect recent changes to Chapter XII of the Manual of the Judge Advocate General (JAGMAN).

**DATES:** Effective April 16, 2004.

**FOR FURTHER INFORMATION CONTACT:**

LCDR Jason Baltimore, Personnel Law Branch, Administrative Law Division (Code 13), Office of the Judge Advocate General, 1322 Patterson Avenue SE., Suite 3000, Washington Navy Yard, DC 20374-5066, (703) 604-8208.

**SUPPLEMENTARY INFORMATION:** Pursuant to the authority cited below, the Department of the Navy amends 32 CFR part 752. This amendment provides notice that the Judge Advocate General of the Navy has made administrative corrections to the Admiralty Claims regulations found in Chapter XII of the JAGMAN. It has been determined that invitation of public comment on this amendment would be impractical and unnecessary, and is therefore not required under the public rule-making provisions of 32 CFR parts 336 and 701. However, interested persons are invited to comment in writing on this

amendment. All written comments received will be considered in making subsequent amendments or revisions of 32 CFR part 752, or the instructions on which they are based. It has been determined that this final rule is not a major rule within the criteria specified in Executive Order 12866, as amended by Executive Order 13258, and does not have substantial impact on the public. This submission is a statement of policy and as such can be effective upon publication in the **Federal Register**.

#### Matters of Regulatory Procedure

##### *Executive Order 12866, Regulatory Planning and Review*

This rule does not meet the definition of "significant regulatory action" for purposes of Executive Order 12866, as amended by Executive Order 13258.

##### *Regulatory Flexibility Act*

This rule will not have a significant economic impact on a substantial number of small entities for purposes of the Regulatory Flexibility Act (5 U.S.C. Chapter 6).

##### *Paperwork Reduction Act*

This rule does not impose collection of information requirements for purposes of the Paperwork Reduction Act (44 U.S.C. Chapter 35, 5 CFR Part 1320).

#### List of Subjects in 32 CFR Part 752

Admiralty Claims.

■ For the reasons set forth in the preamble, the Department of the Navy amends 32 CFR Part 752 to read as follows:

#### PART 752—ADMIRALTY CLAIMS

##### **§ 752.2 [Amended]**

■ 1. Section 752.2, paragraph (a), is amended by removing the date "(1994)" following all citations to the United States Code.

##### **§ 752.3 [Amended]**

■ 2. Section 752.3, paragraph (a), is amended by removing the date "(1994)" following the citation to the United States Code and by removing the amount "\$1,000,000" and adding in its place the amount "\$15,000,000" wherever it occurs.

##### **§ 752.4 [Amended]**

■ 3. Section 752.4, paragraphs (a) and (c), are amended by removing the date "(1994)" following all citations to the United States Code.

##### **§ 752.5 [Amended]**

■ 4. Section 752.5, paragraph (b), is amended by removing the date "(1994)"

following all citations to the United States Code.

Dated: April 5, 2004.

**J.T. Baltimore,**

*Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Alternate Federal Register Liaison Officer.*

[FR Doc. 04-8631 Filed 4-15-04; 8:45 am]

BILLING CODE 3810-FF-P

## SELECTIVE SERVICE SYSTEM

### 32 CFR Parts 1602, 1605, 1609, and 1656

RIN 3240-AA01

#### Alternative Service Worker Appeals of Denied Job Reassignments

**AGENCY:** Selective Service System

**ACTION:** Final rule.

**SUMMARY:** The Selective Service System (SSS) amends its regulations regarding the procedures for conscientious objectors, who have been placed in the Alternative Service Program as Alternative Service Workers (ASW), to appeal denied requests for job reassignments during a military draft. Civilian Review Boards (CRB), whose sole responsibility is to decide ASW appeals of denied job reassignments, are abolished with their responsibilities transferred to District Appeal Boards (DAB). This organizational change is necessary to ensure a more efficient and economical administration of the SSS. Its primary intended effect is to eliminate the administrative costs of maintaining separate appeal boards for ASWs without adversely impacting on the Agency's ability to expeditiously decide appeals of denied job reassignments or appeals of local board classification decisions. A secondary intended effect is to improve customer service to ASWs during a military draft.

**EFFECTIVE DATE:** April 16, 2004.

**FOR FURTHER INFORMATION CONTACT:**

Rudy G. Sanchez, Jr., Office of the General Counsel, Selective Service System, 1515 Wilson Blvd., Arlington, VA 22209-2425. 703-605-4012.

**SUPPLEMENTARY INFORMATION:**

#### Proposed Rule and Public Comment

The proposed amendments to Selective Service Regulations were published for public comment in the **Federal Register** on February 6, 2004 (69 FR 5797). No comments were received. The proposed amendments to Selective Service regulations will become a final rule.

## Background

Selective Service regulations are published pursuant to section 13(b) of the Military Selective Service Act (MSSA), 50 U.S.C. App. 463(b), and Executive Order 11623. The regulations implement the MSSA (50 U.S.C. App. 451 *et seq.*), which authorizes the President to create and establish within the Selective Service System civilian local boards, civilian appeal boards, and such other civilian agencies, including agencies of appeal, as may be necessary to carry out its functions [50 U.S.C. App. 460(b)(3)]. Executive Order 11623 delegates to the Director of Selective Service the authority to prescribe the necessary rules and regulations to carry out the provisions of the MSSA.

Under existing regulations, 48 Civilian Review Boards (CRB) were established to decide appeals of denied requests for job reassignments made by conscientious objectors who have been placed in the Alternative Service Program as Alternative Service Workers (ASW). The sole function of CRBs was to decide such appeals during a military draft. Selective Service determined that maintaining CRBs was unnecessary for it to carry out its functions because their responsibilities could be transferred to the 96 DABs, which had previously been solely responsible for deciding appeals of local board classification decisions during a military draft. The conversion will not result in a significant increase in the workload of DABs, and their primary responsibility of deciding appeals of local board decisions will be unimpeded. If it becomes necessary to accommodate an unexpectedly high workload during a draft, the number of members on a DAB could be increased to create separate panels thereof.

This conversion will have three significant benefits. First, it will eliminate the unnecessary administrative costs of maintaining separate boards for ASW appeals of denied job reassignments. Second, it will result in more frequent pre-mobilization training of board members on the requirements for deciding ASW appeals. Finally, customer service to ASWs during a military draft will be improved by doubling the number of locations for them to appeal denied job reassignments. In view of the foregoing, CRBs are abolished with their responsibilities transferred to DABs.

## Implementation

To implement the conversion, the following parts and sections in 32 CFR chapter XVI are amended:

Section 1602.11—To change the definition of “District Appeal Board” to include the ability to act on cases in accordance with part 1656 (Alternative Service);

Section 1605.24—To give DABs jurisdiction to decide appeals of denied job reassignment requests;

Section 1609.1—To remove members of “civilian review boards” as uncompensated positions within Selective Service;

Section 1656.1—To remove the definition of “Civilian Review Board”, and renumber the section’s definitions accordingly;

Section 1656.3—To remove the paragraph establishing CRBs, and renumber the paragraphs accordingly;

Section 1656.13—To remove paragraph “e”, which requires the establishment of CRBs, and to re-letter the section’s paragraphs accordingly;

Section 1656.18—To amend paragraph “c” for conformity of citations therein to the re-lettering of paragraphs in § 1656.13;

Finally, throughout part 1656 several sections are amended to remove the words, “Civilian Review Board”, and add the words, “District Appeal Board” in their place.

## Matters of Rule Making Procedure

In promulgating these amendments to Selective Service regulations, I have adhered to the regulatory philosophy and the applicable principles of regulation set forth in section 1 of Executive Order 12866, Regulatory Planning and Review. These amendments have not been reviewed by the Office of Management and Budget under that Executive Order, as they are not deemed “significant” thereunder.

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96–354, 94 Stat. 1164, 5 U.S.C. 601–612), I certify that the amendments do not have a significant economic impact on a substantial number of small entities.

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply because this rule does not contain an information collection requirement that requires approval of the Office of Management and Budget.

## Certificate

Whereas, on February 6, 2004, the Director of Selective Service published a Notice of Proposed Amendments of Selective Service Regulations at 69 FR 5797; and whereas such publication complied with the publication requirement of section 13(b) of the Military Selective Service Act [50 U.S.C. App. 463(b)] in that more than 30 days have elapsed subsequent to such

publication during which period the public was given an opportunity to submit comments; and whereas I certify that I have requested the view of officials named in section 2(a) of Executive Order 11623 and none of them has timely requested that the matter be referred to the President for decision.

Therefore, by virtue of the authority vested in me by the Military Selective Service Act, as amended, (50 U.S.C. App. 451 *et seq.*) and Executive Order 11623 of October 12, 1971, the Selective Service Regulations constituting a portion of Chapter XVI of Title 32 of the Code of Federal Regulations, are hereby amended, as stated below.

## List of Subjects in 32 CFR Parts 1602, 1605, 1609, and 1656

Selective Service System.

■ For the reasons stated in the preamble, the Selective Service System amends 32 CFR parts 1602, 1605, 1609, and 1656 as follows:

## PART 1602—DEFINITIONS

■ 1. The authority citation for part 1602 continues to read as follows:

**Authority:** Military Selective Service Act (50 U.S.C. App. 451 *et seq.*); E.O. 11623.

■ 2. Revise § 1602.11 to read as follows:

### § 1602.11 District appeal board.

A district appeal board or a panel thereof of the Selective Service System is a group of not less than three civilian members appointed by the President to act on cases of registrants in accordance with the provisions of parts 1651 and 1656 of this chapter.

## PART 1605—SELECTIVE SERVICE SYSTEM ORGANIZATION

■ 1. The authority citation for part 1605 continues to read as follows:

**Authority:** Military Selective Service Act (50 U.S.C. App. 451 *et seq.*); E.O. 11623.

■ 2. Amend § 1605.24 by redesignating the introductory text and paragraphs (a), (b), and (c) as paragraph (a) introductory text and paragraphs (a)(1), (2) and (3), respectively, and by adding paragraph (b) to read as follows:

### § 1605.24 Jurisdiction.

\* \* \* \* \*

(b) The district appeal board shall have jurisdiction to review and to affirm or change any Alternative Service Office Manager decision appealed to it by an Alternative Service Worker pursuant to part 1656 of this chapter.

**PART 1609—UNCOMPENSATED PERSONNEL**

- 1. The authority citation for part 1609 continues to read as follows:

**Authority:** Military Selective Service Act (50 U.S.C. App. 451 *et seq.*); E.O. 11623.

- 2. Amend § 1609.1 by revising the first sentence to read as follows:

**§ 1609.1 Uncompensated positions.**

Members of local boards, district appeal boards, and all other persons volunteering their services to assist in the administration of the Selective Service Law shall be uncompensated.  
\* \* \*

**PART 1656—ALTERNATIVE SERVICE**

- 1. The authority citation for part 1656 continues to read as follows:

**Authority:** Military Selective Service Act (50 U.S.C. App. 451 *et seq.*); E.O. 11623.

**PART 1656—[AMENDED]**

- 2. Amend part 1656, Alternative Service, to remove the words “Civilian Review Board” and add, in their place, the words “District Appeal Board,” in the following places:

- a. § 1656.11(b)(4)
- b. § 1656.13(d), (f), (g), and (h)
- c. § 1656.18(c)

**§ 1656.1 [Amended]**

- 3. Amend § 1656.1 by removing paragraph (b)(6) and redesignating paragraphs (b)(7) through (14) as paragraphs (b)(6) through (13).

**§ 1656.3 [Amended]**

- 4.–5. Amend § 1656.3 by removing paragraph (a)(10) and redesignating paragraphs (a)(11) through (13) as paragraphs (a)(10) through (12).

**§ 1656.13 [Amended]**

- 6.–7. Amend § 1656.13 by removing paragraph (e) and by redesignating paragraphs (f) through (h) as paragraphs (e) through (g).

**§ 1656.18 [Amended]**

- 8. Amend § 1656.18(c) by revising the phrase “§ 1656.13(c) or (g)” to read “§ 1656.13(c) or (f)”.

**Lewis C. Brodsky,**

*Acting Director of Selective Service.*

[FR Doc. 04–8606 Filed 4–15–04; 8:45 am]

**BILLING CODE 8015–01–P**

**DEPARTMENT OF HOMELAND SECURITY****Coast Guard****33 CFR Part 117**

**[CGD05–04–070]**

**RIN 1625–AA09**

**Drawbridge Operation Regulations; Kent Island Narrows, MD**

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of temporary deviation from regulations and request for comments.

**SUMMARY:** The Commander, Fifth Coast Guard District, has issued a temporary deviation from the drawbridge operation regulations to test an alternate drawbridge operation regulation for the U.S. Route 50/301 Bridge, mile 1.0, across Kent Island Narrows at Kent Island, Maryland. Under this temporary 90-day deviation, from May 1, through July 29, from 6 a.m. to 9 p.m., the bridge will open on the hour and half hour for the passage of all waiting vessels. The purpose of this temporary deviation is to test an alternate drawbridge operation schedule for 90 days and solicit comment from the public.

**DATES:** This deviation is effective from May 1, 2004, through July 29, 2004. Comments must reach the Coast Guard on or before 31 August 2004.

**ADDRESSES:** You may mail comments and related material to Commander (obr), Fifth Coast Guard District, Federal Building, 4th Floor, 431 Crawford Street, Portsmouth, Virginia 23704–5004, or they may be hand delivered to the same address between 8 a.m. and 4 p.m., Monday through Friday, except Federal Holidays. The Commander (obr), Fifth Coast Guard District maintains the public docket for this test deviation. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, will become part of this docket and will be available for inspection or copying at the above address.

**Request for Comments**

We encourage you to participate in evaluating this test schedule by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this test deviation CGD05–04–070, indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an

unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know they reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period.

**FOR FURTHER INFORMATION CONTACT:** Bill Brazier, Bridge Management Specialist, Fifth Coast Guard District, at (757) 398–6422.

**SUPPLEMENTARY INFORMATION:** The U.S. Route 50/301 Bridge across Kent Island Narrows has a vertical clearance in the closed position of 18 feet at mean high water and 19 feet at mean low water. The existing drawbridge operation regulations are listed at 33 CFR 117.561. The bridge owner, the Maryland State Highway Authority, requested a temporary deviation from the drawbridge operation regulations to test for a period of 90 days an alternate drawbridge operation schedule. This deviation will expand the time the bridge is required to open to vessel traffic to on the hour and half hour for the period specified. This will assist in determining if additional openings are needed. The current bridge opening schedule has impacted navigational users attempting to transit through the bridge.

The existing drawbridge operation regulations, outlined at 33 CFR 117.561 (b), states that: from May through October 31, on Monday (except when Monday is a holiday) through Thursday (except when Thursday is the day before a Friday holiday), the draw shall open on signal on the hour from 7 a.m. to 7 p.m., but need not be opened at any other time; on Friday (except when Friday is a holiday) and on Thursday when it is the day before a Friday holiday, the draw shall open on signal on the hour from 6 a.m. to 3 p.m. and at 8 p.m., but need not be opened at any other time; on Saturday and on a Friday holiday, the draw shall open on signal at 6 a.m. and 12 noon and on signal on the hour from 3 p.m. to 8 p.m., but need not be opened at any other time; on Sunday and on a Monday holiday, the draw shall open on signal on the hour from 6 a.m. to 1 p.m., and at 3:30 p.m., but need not be opened at any other time; the draw shall open at scheduled opening times only if vessels are waiting to pass. At each opening, the draw shall remain open for a sufficient period of time to allow passage of all waiting vessels; and if a vessel is approaching the bridge and cannot reach the bridge exactly on the hour, the drawtender may delay the hourly opening up to ten minutes past the hour for the passage of

the approaching vessel and any other vessels that are waiting to pass.

Under this 90-day temporary deviation, effective from May 1, 2004 through July 29, 2004, the U.S. Route 50/301 Bridge across Kent Island Narrows will open from 6 a.m. to 9 p.m., on the hour and half hour, until all waiting vessels have passed.

This deviation from the operating regulations is authorized under 33 CFR 117.43.

Dated: April 9, 2004.

**Waverly W. Gregory, Jr.,**

*Chief, Bridge Branch, Fifth Coast Guard District.*

[FR Doc. 04-8710 Filed 4-15-04; 8:45 am]

**BILLING CODE 4910-15-P**

## DEPARTMENT OF DEFENSE

### Department of the Army, Corps of Engineers

#### 33 CFR Part 334

#### United States Navy Restricted Area, Naval Base Ventura County, Port Hueneme, California

**AGENCY:** United States Army Corps of Engineers, DoD.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Army Corps of Engineers is amending its regulations to establish a restricted area in waters adjacent to Naval Base Ventura County, Port Hueneme, California. This amendment would prohibit vessels and persons from entering Port Hueneme Harbor, from the seaward ends of the two entrance jetties to the shoreline, without first obtaining permission from the Commanding Officer of Naval Base Ventura County. This amendment is necessary to safeguard U.S. Navy vessels and U.S. Government facilities from sabotage and other subversive acts, accidents, or incidents of similar nature.

**EFFECTIVE DATE:** May 17, 2004.

**ADDRESSES:** U.S. Army Corps of Engineers, Attn: CECW-OR, 441 G Street, NW., Washington, DC 20314-1000.

**FOR FURTHER INFORMATION CONTACT:** Mr. Frank Torbett, Headquarters Regulatory Branch, Washington, DC at (202) 761-1075, or Mr. Mark D. Cohen, Corps of Engineers, Los Angeles District, Regulatory Branch, at (213) 452-3413.

**SUPPLEMENTARY INFORMATION:** Pursuant to its authorities in section 7 of the River and Harbor Act of 1917 (40 Stat. 266; 33 U.S.C. 1) and Chapter XIX, of the Army Appropriations Act of 1919 (40 Stat. 892; 33 U.S.C. 3) the Corps is

proposing to amend the restricted area regulations in 33 CFR part 334 by establishing a restricted area in waters of the U.S. adjacent to Naval Base Ventura County, Port Hueneme, California. According to Oxnard Harbor District staff, more informal advanced notification procedures similar to those proposed have been in place for quite some time. Pursuant to Federal regulations at 33 CFR 165, the U.S. Coast Guard has imposed a temporary security zone that requires advanced notification requirements for all vessels entering Port Hueneme Harbor until establishment of this restricted area. The restricted area will permanently establish formal advanced notification procedures for all vessels and persons seeking to enter Port Hueneme Harbor landward of the seaward limits or ends of the two entrance jetties.

#### Procedural Requirements

##### *a. Review Under Executive Order 12866*

This rule is issued with respect to a military function of the Defense Department and the provisions of Executive Order 12866 do not apply.

##### *b. Review Under the Regulatory Flexibility Act*

This rule has been reviewed under the Regulatory Flexibility Act (Public Law 96-354) which requires the preparation of a regulatory flexibility analysis for any regulation that will have a significant economic impact on a substantial number of small entities (*i.e.*, small businesses and small governments). The Corps expects that the economic impact of this new restricted area would have practically no impact on the public, no anticipated navigational hazard or interference with existing waterway traffic and accordingly, certifies that this proposal will have no significant economic impact on small entities.

##### *c. Review Under the National Environmental Policy Act*

The Los Angeles District has prepared an Environmental Assessment (EA) for this action. The District has concluded, based on the minor nature of the additional restricted area, that this action will not have a significant impact to the quality of the human environment, and preparation of an Environmental Impact Statement (EIS) is not required. The EA may be reviewed at the Los Angeles District office listed at the end of **FOR FURTHER INFORMATION CONTACT**, above.

##### *d. Unfunded Mandates Act*

This rule does not impose an enforceable duty among the private

sector and, therefore, is not a Federal private sector mandate and is not subject to the requirements of section 202 or 205 of the Unfunded Mandates Act. We have also found under section 203 of the Act, that small Governments will not be significantly and uniquely affected by this rulemaking.

##### *e. Submission to Congress and the General Accounting Office*

Pursuant to section 801(a)(1)(A) of the Administrative Procedure Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, the Army has submitted a report containing this Rule to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the General Accounting Office. This Rule is not a major Rule within the meaning of section 804(2) of the Administrative Procedure Act, as amended.

#### List of Subjects in 33 CFR Part 334

Danger zones, Marine safety, Navigation (water), Restricted areas, Waterways.

■ For the reasons set out in the preamble, the Corps proposes to amend 33 CFR part 334 as follows:

#### **PART 334—DANGER ZONE AND RESTRICTED AREA REGULATIONS**

■ 1. The authority citation for part 334 continues to read as follows:

**Authority:** 40 Stat. 266 (33 U.S.C. 1) and 40 Stat. 892 (33 U.S.C. 3).

■ 2. Section 334.1127 is added to read as follows:

##### **§ 334.1127 Naval Base Ventura County, Port Hueneme, California; Restricted Area.**

(a) *The area.* The waters within Port Hueneme Harbor, beginning at the seaward ends of the two Port Hueneme Harbor entrance jetties, with the northwestern entrance jetty end occurring at latitude 34°8'37.0" N., longitude 119°12'58.8" W. and the southeastern entrance jetty occurring at latitude 34°8'34.8" N, longitude 119°12'43.2" W., and extending northeasterly to the shoreline.

(b) *The regulation.* No vessels or persons may enter the restricted area unless permission is obtained in advance from the Commanding Officer of Naval Base Ventura County. Commercial vessels that are required to make Advanced Notifications of Arrival shall continue to do so. All vessels must obtain clearance from "Control 1" over marine radio channel 06 VHF-FM prior to crossing the COLREGS (Collision Regulations) demarcation line. Vessels without marine radio capability must obtain clearance in advance by

contacting "Control 1" via telephone at (805) 982-3938 prior to crossing the COLREGS demarcation line. The COLREGS demarcation line is defined as a line approximately 1,500 feet in length connecting the seaward limits or ends of the two Port Hueneme Harbor entrance jetties, with the northwestern jetty end occurring at latitude 34°8'37.0" N., longitude 119°12'58.8" W., and the southeastern entrance jetty occurring at latitude 34°8'34.8" N., longitude 119°12'43.2" W. (NAD83).

(c) *Enforcement.* The regulation in this section, promulgated by the United States Army Corps of Engineers, shall be enforced by the Commanding Officer of Naval Base Ventura County, and such agencies or persons as he/she may designate.

Dated: March 11, 2004.

**Michael B. White,**

Chief, Operations, Directorate of Civil Works.  
[FR Doc. 04-8602 Filed 4-15-04; 8:45 am]

BILLING CODE 3710-92-P

## DEPARTMENT OF DEFENSE

### Department of the Army, Corps of Engineers

#### 33 CFR Part 334

#### United States Navy Restricted Area, Naval Base Ventura County, Point Mugu, CA

**AGENCY:** United States Army Corps of Engineers, DoD.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Army Corps of Engineers is amending its regulations to establish a restricted area in waters adjacent to Naval Base Ventura County, Point Mugu, California. This amendment would prohibit vessels from entering a six-mile-long by one-quarter-mile-wide section of the Pacific Ocean along the shoreline between the up-coast limit and the down-coast limit of Point Mugu without first obtaining permission from the Commanding Officer of Naval Base Ventura County. This amendment is necessary to safeguard U.S. Navy vessels and U.S. Government facilities from sabotage and other subversive acts, accidents, or incidents of similar nature.

**EFFECTIVE DATE:** May 17, 2004.

**ADDRESSES:** U.S. Army Corps of Engineers, Attn: CECW-OR, 441 G Street, NW., Washington, DC 20314-1000.

**FOR FURTHER INFORMATION CONTACT:** Mr. Frank Torbett, Headquarters Regulatory Branch, Washington, DC at (202) 761-

1075, or Mr. Mark D. Cohen, Corps of Engineers, Los Angeles District, Regulatory Branch, at (213) 452-3413.

**SUPPLEMENTARY INFORMATION:** Pursuant to its authorities in section 7 of the River and Harbor Act of 1917 (40 Stat. 266; 33 U.S.C. 1) and Chapter XIX, of the Army Appropriations Act of 1919 (40 Stat. 892; 33 U.S.C. 3) the Corps is proposing to amend the restricted area regulations in 33 CFR part 334 by establishing a restricted area in waters of the U.S. adjacent to Point Mugu, California. The proposed restricted area would permanently establish formal advanced notification procedures for all vessels seeking to enter a six-mile-long by one-quarter-mile-wide section of the Pacific Ocean along the shoreline between the up-coast limit and the down-coast limit of Point Mugu.

#### Procedural Requirements

##### a. Review Under Executive Order 12866

This rule is issued with respect to a military function of the Defense Department and the provisions of Executive Order 12866 do not apply.

##### b. Review Under the Regulatory Flexibility Act

This rule has been reviewed under the Regulatory Flexibility Act (Public Law 96-354) which requires the preparation of a regulatory flexibility analysis for any regulation that will have a significant economic impact on a substantial number of small entities (*i.e.*, small businesses and small governments). The Corps expects that the economic impact of this new restricted area would have practically no impact on the public, no anticipated navigational hazard or interference with existing waterway traffic and accordingly, certifies that this proposal will have no significant economic impact on small entities.

##### c. Review Under the National Environmental Policy Act

The Los Angeles District has prepared an Environmental Assessment (EA) for this action. The District has concluded, based on the minor nature of the addition of this restricted area, that this action will not have a significant impact to the quality of the human environment, and preparation of an Environmental Impact Statement (EIS) is not required. The EA may be reviewed at the Los Angeles District office listed at the end of **FOR FURTHER INFORMATION CONTACT**, above.

##### d. Unfunded Mandates Act

This rule does not impose an enforceable duty among the private

sector and, therefore, is not a Federal private sector mandate and is not subject to the requirements of section 202 or 205 of the Unfunded Mandates Act. We have also found under section 203 of the Act, that small Governments will not be significantly and uniquely affected by this rulemaking.

##### e. Submission to Congress and the General Accounting Office

Pursuant to section 801(a)(1)(A) of the Administrative Procedure Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, the Army has submitted a report containing this Rule to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the General Accounting Office. This Rule is not a major Rule within the meaning of section 804(2) of the Administrative Procedure Act, as amended.

#### List of Subjects in 33 CFR Part 334

Danger zones, Marine safety, Navigation (water), Restricted areas, Waterways.

■ For the reasons set out in the preamble, the Corps proposes to amend 33 CFR part 334 as follows:

#### PART 334—DANGER ZONE AND RESTRICTED AREA REGULATIONS

■ 1. The authority citation for Part 334 continues to read as follows:

**Authority:** 40 Stat. 266 (33 U.S.C. 1) and 40 Stat. 892 (33 U.S.C. 3).

■ 2. Section 334.1126 is added to read as follows:

##### § 334.1126 Naval Base Ventura County, Point Mugu, California; Restricted Area.

(a) *The area.* The restricted area at Naval Base Ventura County Point Mugu incorporates its shoreline and connects the following points: latitude 34°7'9.9", longitude 119°9'35.6" (up-coast shoreline point); latitude 34°7'0.0", longitude 119°9'46.7" latitude 34°6'44.9", longitude 119°9'22.5"; latitude 34°6'30.2", longitude 119°8'59.0"; latitude 34°6'20.5", longitude 119°8'46.7"; latitude 34°6'8.4", longitude 119°8'25.2"; latitude 34°5'53.7"; longitude 119°7'59.5"; latitude 34°5'45.9", longitude 119°7'41.5"; latitude 34°5'40.1", longitude 119°7'21.0"; latitude 34°5'33.6", longitude 119°6'58.1"; latitude 34°5'31.2", longitude 119°6'37.9"; latitude 34°5'31.0", longitude 119°6'22.2"; latitude 34°5'32.9", longitude 119°6'14.4"; latitude; 34°5'44.7", longitude 119°5'54.0"; latitude 34°5'45.2", longitude 119°5'43.5"; latitude 34°5'41.0", longitude 119°5'21.2";

latitude 34°5'42.2", longitude 119°5'13.3"; latitude 34°5'27.8", longitude 119°4'49.5"; latitude 34°5'17.9", longitude 119°4'27.9"; latitude 34°5'5.7", longitude 119°3'59.90"; latitude; 34°5'17.9", longitude 119°3'55.4" (down-coast shoreline point).

(b) *The regulation.* No vessels may enter the restricted area unless permission is obtained in advance from the Commanding Officer of Naval Base Ventura County. Contact Naval Base Ventura County Security at (805) 989-7907.

(c) *Enforcement.* The regulation in this section, promulgated by the United States Army Corps of Engineers, shall be enforced by the Commanding Officer of Naval Base Ventura County, and such agencies or persons as he/she may designate.

Dated: March 11, 2004.

**Michael B. White,**

Chief, Operations, Directorate of Civil Works.  
[FR Doc. 04-8601 Filed 4-15-04; 8:45 am]

BILLING CODE 3710-92-P

## DEPARTMENT OF DEFENSE

### Corps of Engineers, Department of the Army

#### 33 CFR Part 334

#### United States Coast Guard Restricted Area, San Francisco Bay, Yerba Buena Island, San Francisco, CA

**AGENCY:** U.S. Army Corps of Engineers, DoD.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Army Corps of Engineers is amending its regulations to establish a Restricted Area in the waters of San Francisco Bay on the east side of Yerba Buena Island, San Francisco, San Francisco County, California. The designation would ensure public safety and satisfy the security, safety, and operational requirements as they pertain to the Coast Guard Group San Francisco on Yerba Buena Island, by establishing an area into which unauthorized vessels and persons may not enter.

**EFFECTIVE DATE:** May 17, 2004.

**ADDRESSES:** U.S. Army Corps of Engineers, ATTN: CECW-OR, 441 G Street, NW., Washington, DC 20314-1000.

**FOR FURTHER INFORMATION CONTACT:** Mr. Frank Torbett, Headquarters Regulatory Branch at (202) 761-1075 or Mr. Bryan Matsumoto, Corps San Francisco District, at (415) 977-8476.

**SUPPLEMENTARY INFORMATION:** Pursuant to its authorities in Section 7 of the Rivers and Harbors Act of 1917 (40 Stat. 266; 33 U.S.C. 1) and Chapter XIX of the Army Appropriation Act of 1919 (40 Stat. 892; 33 U.S.C. 3) the Corps is amending the Restricted Area regulations in 33 CFR Part 334 by establishing a new Restricted Area at 334.1065, in the waters of San Francisco Bay on the east side of Yerba Buena Island, San Francisco, San Francisco County, California. This amendment will close off an open area in San Francisco Bay from a point along the southeastern shore of Yerba Buena Island at latitude 37°48'27" North, longitude 122°21'44" West; east to latitude 37°48'27" North, longitude 122°21'35" West; north to latitude 37°48'49" North, longitude 122°21'35" West, a point on the northeastern side of Yerba Buena Island. These coordinates correct a small error in the coordinates in the proposed notice, but the change in size and shape of the Restricted Area is considered negligible. The points defining the proposed Restricted Area were selected to isolate dock-side and pier face activity that might present a terrorist threat. Additionally, the Restricted Area would reduce the potential hazard to the public in the event of a rapid response by Coast Guard assets for Homeland Defense and Search and Rescue Operations.

#### Procedural Requirements

##### a. Review Under Executive Order 12866

This rule is issued with respect to security and safety functions of the U.S. Coast Guard and the provisions of Executive Order 12866 do not apply.

##### b. Review Under the Regulatory Flexibility Act

This rule has been reviewed under the Regulatory Flexibility Act (Pub. L. 96-354), which requires the preparation of a regulatory flexibility analysis for any regulation that will have a significant economic impact on a substantial number of small entities (*i.e.*, small businesses and small governments). The Corps expects that the economic impact of the establishment of this Restricted Area would have no impact on the public, no anticipated navigational hazard or interference with existing waterway traffic, and accordingly, certifies that this proposal, if adopted, will have no significant economic impact on small entities.

##### c. Review Under the National Environmental Policy Act

The San Francisco District has prepared an Environmental Assessment (EA) for this action. We have concluded that this action will not have a significant impact on the human environment, and preparation of an Environmental Impact Statement (EIS) is not required. The EA will be available for review at the San Francisco District office listed at the end of the **FOR FURTHER INFORMATION CONTACT** paragraph above.

##### d. Unfunded Mandates Act

This rule does not impose an enforceable duty among the private sector and, therefore, is not a Federal private sector mandate and is not subject to the requirements of Section 202 or 205 of the Unfunded Mandates Act. We have also found under Section 203 of the Act that small governments will not be significantly and uniquely affected by this rulemaking.

##### e. Submission to Congress and the General Accounting Office

Pursuant to Section 801(a)(1)(A) of the Administrative Procedure Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, the Army has submitted a report containing this rule to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the General Accounting Office. This rule is not a major rule within the meaning of Section 804(2) of the Administrative Procedure Act, as amended.

#### List of Subjects in 33 CFR Part 334

Danger zones, Marine safety, Navigation (water), Restricted areas, Waterways.

■ For the reasons set out in the preamble, we amend 33 CFR Part 334 to read as follows:

#### PART 334—DANGER ZONE AND RESTRICTED AREA REGULATIONS

■ 1. The authority citation for part 334 continues to read as follows:

**Authority:** 40 Stat. 266; (33 U.S.C. 1) and 40 Stat. 892; (33 U.S.C. 3)

■ 2. Section 334.1065 is added to read as follows:

#### § 334.1065 U.S. Coast Guard Station, San Francisco Bay, Yerba Buena Island, San Francisco Bay, California; Restricted Area.

(a) *The area.* San Francisco Bay on the east side of Yerba Buena Island: From a point along the southeastern shore of Yerba Buena Island at latitude 37°48'27" North, longitude 122°21'44" West; east to latitude 37°48'27" North, longitude

122°21'35" West; north to latitude 37°48'49" North, longitude 122°21'35" West, a point on the northeastern side of Yerba Buena Island.

(b) *The regulation.* (1) All persons and vessels are prohibited from entering the waters within the Restricted Area for any reason without prior written permission from the Commanding Officer of the Coast Guard Group San Francisco on Yerba Buena Island.

(2) Mooring, anchoring, fishing, transit and/or swimming shall not be allowed within the Restricted Area without prior written permission from the Commanding Officer of the Coast Guard Group San Francisco on Yerba Buena Island.

(c) *Enforcement.* The regulation in this section shall be enforced by the Commanding Officer of the Coast Guard Group San Francisco on Yerba Buena Island, and such agencies and persons as he/she shall designate.

Dated: March 11, 2004.

**Michael B. White,**

*Chief, Operations, Directorate of Civil Works.*

[FR Doc. 04-8600 Filed 4-15-04; 8:45 am]

BILLING CODE 3710-92-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[MI84-02; FRL-7647-6]

### Conditional Approval and Promulgation of Implementation Plans: Michigan: Oxides of Nitrogen Rules

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is conditionally approving a State Implementation Plan (SIP) revision submitted by the State of Michigan on April 3, 2003. The submittal made by the Michigan Department of Environmental Quality (MDEQ) responds to the EPA's regulation entitled, "Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone," otherwise known as the "NO<sub>x</sub> SIP Call." The rules submitted by MDEQ establish a nitrogen oxides (NO<sub>x</sub>) emissions allowance trading program for large electric generating and industrial units, and require reductions from large electric generating and industrial units and cement kilns, beginning in 2004. The intended effect of the regulations submitted by MDEQ is to reduce

emissions of NO<sub>x</sub> to help attain the national ambient air quality standard for ozone. EPA is conditionally approving Michigan's Oxides of Nitrogen Budget Trading Program because it generally meets the requirements of the Phase I NO<sub>x</sub> SIP Call designed to significantly reduce ozone in Michigan and ozone transport in the eastern United States.

**DATES:** This rule is effective on May 3, 2004.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. MI84. All documents in the Docket are listed in the index. Although listed in the index, some information is not publicly available, *i.e.*, Confidential Business Information or other information whose disclosure is restricted by statute. Publicly available docket materials are available in hard copy at: Criteria Pollutant Section, Air Programs Branch (AR-18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604. (Please contact Douglas Aburano at (312) 353-6960 or [aburano.douglas@epa.gov](mailto:aburano.douglas@epa.gov) before visiting the Region 5 Office.)

#### FOR FURTHER INFORMATION CONTACT:

Douglas Aburano, Environmental Engineer, Criteria Pollutant Section (AR-18J), Air Programs Branch, Air and Radiation Division, United States Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353-6960, fax (312) 886-5824, [aburano.douglas@epa.gov](mailto:aburano.douglas@epa.gov).

#### SUPPLEMENTARY INFORMATION:

Throughout this document, the terms "you" refer to the reader of this rule and/or to sources subject to the State rule, and the terms "we," "us," or "our" refer to EPA.

On April 3, 2003, MDEQ submitted a NO<sub>x</sub> emission control plan to the EPA for inclusion in Michigan's SIP to meet the requirements of the Phase I NO<sub>x</sub> SIP Call. The revisions generally comply with the requirements of the Phase I NO<sub>x</sub> SIP Call. Included in this submission are Michigan Rules 802 through 817. The information in this conditional approval is organized as follows:

- I. What Action Is EPA Taking Today?
- II. Statutory and Executive Order Reviews.

#### I. What Action Is EPA Taking Today?

EPA is conditionally approving revisions to Michigan's SIP concerning the adoption of its NO<sub>x</sub> emission trading rules, which the State submitted on April 3, 2003. The rules meet the requirements of the Phase I NO<sub>x</sub> SIP Call with certain exceptions which EPA identified in our February 26, 2004,

proposed conditional approval (69 FR 8905). In a letter dated January 9, 2004, MDEQ committed to submit fully adopted rules addressing the deficiencies by May 31, 2004. MDEQ is in the process of adopting rules to correct these deficiencies. Once MDEQ has submitted the rule changes to address these deficiencies, we can take action to fully approve the SIP revision. If Michigan does not submit approvable revisions by this date, this conditional approval will automatically revert to a disapproval of the Michigan NO<sub>x</sub> SIP submission.

EPA published in the **Federal Register** on February 26, 2004 (69 FR 8905) a proposal to conditionally approve Michigan's SIP revision. You can find additional information regarding the State of Michigan's submittal and our rationale for conditionally approving it in the February 26, 2004 proposed rule where we described, in detail, the Michigan SIP revision, as well as the deficiencies that Michigan must address before we can fully approve MI's NO<sub>x</sub> trading program. Since we did not receive any adverse comments during the 30 day public comment period, we are finalizing the conditional approval that we proposed on February 26, 2004. Unless this conditional approval is satisfied within 1 year, it will become a disapproval. EPA will publish a document in the **Federal Register** indicating whether the conditional approval was satisfied or became a disapproval.

Pursuant to the good cause exemption in section 553(d)(3) of the Federal Administrative Procedure Act (5 U.S.C. 553(d)(3)), we are making this rule effective on May 3, 2004, which is 15 days after publication of this final action because of the need for the State to allocate allowances to affected sources in a timely manner. Sources will need these allowances for the compliance season which begins on May 31, 2004.

## II. Statutory and Executive Order Reviews

### *Executive Order 12866; Regulatory Planning and Review*

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget.

### *Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use*

Because it is not a "significant regulatory action" under Executive Order 12866 or a "significant energy action," this action is also not subject to

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001).

#### *Regulatory Flexibility Act*

This action merely approves state regulations as meeting Federal requirements and imposes no additional requirements beyond those imposed by state regulations. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

#### *Unfunded Mandates Reform Act*

Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4).

#### *Executive Order 13175 Consultation and Coordination With Indian Tribal Governments*

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

#### *Executive Order 13132 Federalism*

This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act.

#### *Executive Order 13045 Protection of Children From Environmental Health and Safety Risks*

This rule also is not subject to Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant.

#### *National Technology Transfer Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTA), 15 U.S.C. 272, requires federal agencies to use technical standards that are developed or adopted by voluntary consensus to carry out policy objectives, so long as such standards are not inconsistent with applicable law or otherwise impracticable. In reviewing program submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Act. Absent a prior existing requirement for the state to use voluntary consensus standards, EPA has no authority to disapprove a program submission for failure to use such standards, and it would thus be inconsistent with applicable law for EPA to use voluntary consensus standards in place of a program submission that otherwise satisfies the provisions of the Act. Therefore, the requirements of section 12(d) of the NTTA do not apply.

#### *Civil Justice Reform*

As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct.

#### *Governmental Interference With Constitutionally Protected Property Rights*

EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the "Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings" issued under the executive order, and has determined that the rule's requirements do not constitute a taking.

#### *Paperwork Reduction Act*

This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

#### *Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 804

exempts from section 801 the following types of rules: (1) Rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. 5 U.S.C. 804(3). EPA is not required to submit a rule report regarding this action under section 801 because this is a rule of particular applicability.

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by June 15, 2004. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

#### **List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements.

Dated: April 6, 2004.

**Gary Gulezian,**  
*Acting Regional Administrator, Region 5.*

■ Title 40 of the Code of Federal Regulations, chapter I, part 52, is amended as follows:

#### **PART 52—[AMENDED]**

■ 1. The authority citation for part 52 continues to read as follows:

**Authority:** 42 U.S.C. 7401 *et seq.*

#### **Subpart X—Michigan**

■ 2. Subpart X is amended by adding § 52.1218 to read as follows:

#### **§ 52.1218 Identification of plan—conditional approval.**

The plan revision commitment listed in paragraph (a) was submitted on the date specified.

(a) On April 3, 2003, the Michigan Department of Environmental Quality submitted a revision to the Michigan State Implementation Plan. The revision adds rules which require the reduction of oxides of nitrogen from electric generating units, large industrial commercial and institutional boilers and cement kilns.

(1) *Incorporation by reference.* The following rules are incorporated by

reference: R 336.1802 Applicability under oxides of nitrogen budget trading program, Rule 802; R 336.1803 Definitions for oxides of nitrogen budget trading program, Rule 803; R 336.1804 Retired unit exemption from oxides of nitrogen budget trading program, Rule 804; R 336.1805 Standard requirements of oxides of nitrogen budget trading program, Rule 805; R 336.1806 Computation of time under oxides of nitrogen budget trading program, Rule 806; R 336.1807 Authorized account representative under oxides of nitrogen budget trading program, Rule 807; R 336.1808 Permit requirements under oxides of nitrogen budget trading program, Rule 808; R 336.1809 Compliance certification under oxides of nitrogen budget trading program, Rule 809; R 336.1810 Allowance allocations under oxides of nitrogen budget trading program, Rule 810; R 336.1811 New source set-aside under oxides of nitrogen budget trading program, Rule 811; R 336.1812 Allowance tracking system and transfers under oxides of nitrogen budget trading program, Rule 812; R 336.1813 Monitoring and reporting requirements under oxides of nitrogen budget trading program, Rule 813; R 336.1814 Individual opt-ins under oxides of nitrogen budget trading program, Rule 814; R 336.1815 Allowance banking under oxides of nitrogen budget trading program, Rule 815; R 336.1816 Compliance supplement pool under oxides of nitrogen budget trading program, Rule 816; R 336.1817 Emission limitations and restrictions for Portland cement kilns, Rule 817. These rules became effective in the State on December 4, 2002.

(2) [Reserved]  
(b) [Reserved]

[FR Doc. 04-8451 Filed 4-15-04; 8:45 am]

BILLING CODE 6560-50-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 81

[CA 112-RECLAS, FRL-7648-8]

### Clean Air Act Reclassification, San Joaquin Valley Nonattainment Area; California; Ozone

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is taking final action to grant a request by the State of California to voluntarily reclassify under the Clean Air Act ("CAA" or "the Act") the San Joaquin Valley Ozone Nonattainment

Area ("San Joaquin Valley Air Basin" or "SJVAB") from a severe to an extreme 1-hour ozone nonattainment area.

We are also taking final action to require the State to submit by November 15, 2004 an extreme area ozone plan for the areas within the SJVAB under the State's jurisdiction that provides for the attainment of the ozone National Ambient Air Quality Standard ("NAAQS") as expeditiously as practicable, but no later than November 15, 2010. This plan must meet the specific provisions of CAA section 182(e). The State must also submit within 12 months of the effective date of this rule, revised Title V and New Source Review rules that reflect the extreme area statutory requirements.

Once effective, this reclassification of the SJVAB terminates the federal offset sanction that was imposed on March 18, 2004 and also terminates the highway sanction and federal implementation plan clocks. The sanction and FIP clocks were started under CAA section 179(a) upon EPA's 2002 finding that the State failed to submit the statutorily required severe area attainment demonstration for the area.

**EFFECTIVE DATE:** This rule is effective on May 17, 2004.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. CA 112-RECLAS. Docket materials are available in hard copy at EPA's Region IX office during normal business hours by appointment. The address is U.S. EPA Region IX—Air Division, 75 Hawthorne Street, San Francisco, CA 94105-3901. This Regional Office is open from 8 am to 5 pm, Monday through Friday, excluding legal holidays.

#### FOR FURTHER INFORMATION CONTACT:

David Wampler, EPA Region IX, Air Division (AIR-3), 75 Hawthorne Street, San Francisco, CA, 94105; telephone: (415) 972-3975; fax: (415) 947-3579; e-mail: [wampler.david@epa.gov](mailto:wampler.david@epa.gov).

#### SUPPLEMENTARY INFORMATION:

Throughout this document, "we," "us" and "our" refer to EPA.

### I. Proposed Action

On February 23, 2004 (69 FR 8126), EPA proposed to grant a request by the State of California to voluntarily reclassify under Clean Air Act ("CAA") section 181(b)(3), the San Joaquin Valley Ozone Nonattainment Area ("San Joaquin Valley Air Basin" or "SJVAB") from a severe to an extreme nonattainment area for the 1-hour ozone

standard.<sup>1,2</sup> In addition, we proposed that the State submit, by no later than October 1, 2004, an extreme area plan addressing the requirements of CAA section 182(e) and that the State submit revised New Source Review rules and Title V program revisions for the areas within the District's jurisdiction within 12 months from the effective date of the final reclassification.

There are several Indian reservations located within the SJVAB. In our proposed action, we noted that states typically have no jurisdiction under the CAA in Indian country and that California has not been approved by EPA to administer any CAA programs in Indian country. We also stated that, as a matter of EPA's federal implementation of relevant provisions of the CAA over Indian country within the SJVAB, we believe these areas of Indian country should be reclassified to extreme. We contacted all seven tribes with reservations located within the SJVAB to inform them that we intend to include their reservations in the reclassification and to provide the tribes the opportunity for consultation. None of the seven tribes we contacted requested consultation or submitted comments on our proposed action.

### II. Public Comments and EPA Responses

EPA's proposed action provided a 30-day public comment period. During this period, we received three comment letters.<sup>3</sup> Our response immediately follows our summary of each comment letter.

**Comment #1:** On behalf of the Association of Irrigated Residents ("AIR"), The Center on Race Poverty and The Environment requested that EPA approve the State's reclassification request with a contingency that would allow us to rescind the extreme

<sup>1</sup> Letter from Catherine Witherspoon, Executive Officer, California Air Resources Board ("CARB"), to Mr. Wayne Nastri, Regional Administrator, EPA Region IX, dated January 9, 2004. In the letter, CARB transmits to EPA and endorses San Joaquin Valley Unified Air Pollution Control District ("District") Resolution No. 03-12-10 requesting the reclassification.

<sup>2</sup> In the very near future, EPA expects to issue new regulations to implement the 8-hour ozone standard. At that time we will be able to fully evaluate how the transition to the 8-hour standard will impact existing requirements to implement the 1-hour ozone standard.

<sup>3</sup> On April 5, 2004, EPA received an additional comment letter from ChevronTexaco dated March 25, 2004 and postmarked April 1. Although that letter is outside the comment period, EPA has decided to include it in the docket for this rule. ChevronTexaco makes the same comment as the Western States Petroleum Association ("WSPA") (discussed below) regarding additional time for the District to submit required SIP revisions and the extreme area plan.

classification and revert the SJVAB to a severe nonattainment area if the California State Court of Appeal invalidates the District Board resolution requesting the reclassification (#03-12-10, December 18, 2003), or otherwise holds that the District violated State procedural law when it adopted the resolution. AIR added that the contingency should also restart any pending sanctions and FIP clocks and re-apply sanctions already in place. To justify their request, AIR cited their anticipated appeal of the State Superior Court decision.<sup>4</sup>

*EPA Response to Comment #1:* EPA does not believe it is necessary to attach the contingency requested by AIR to the final reclassification of the SJVAB to extreme. In this instance, EPA is granting the January 9, 2004 request of the State under CAA section 181(b)(3) for a voluntary reclassification. In the event that the State Court of Appeal overturns the March 22, 2004 Kern County Superior Court's decision and invalidates the District Board's December 2003 resolution, State law would determine what effect, if any, such a result would have on the State's reclassification request. EPA, in consultation with CARB, will evaluate the impact of any State appellate decision on the reclassification and the pre-existing sanctions clocks and take any appropriate action, including rescission. Moreover, under the Administrative Procedure Act, any interested person can petition EPA for the repeal of any rule. 5 U.S.C. 553(e).

*Comment #2:* The District asked that the submittal date for the 1-hour extreme area ozone plan be delayed 45 days from the October 1, 2004 date we proposed to a new date of November 15, 2004.<sup>5</sup>

The District cited two reasons for needing additional time to submit the extreme area plan. First, the District stated that continued model performance concerns for Central California Ozone Study ("CCOS") ozone episodes have delayed the availability of reliable model runs predicting year 2010 ozone levels for the San Joaquin Valley Air Basin. Second, the District said they needed additional time to conduct their environmental review of the plan under the California Environmental Quality

Act ("CEQA"). While the District acknowledged uncertainty about the extent of the CEQA review, they stated that the timing of the CEQA approval must be dovetailed with the plan adoption which would most likely occur in August or September 2004, with CARB approval in October 2004.

*EPA Response to Comment #2:* EPA understands from the District's comment letter that the concerns regarding the modeling runs were resolved during the week of March 22, 2004 and that, as a result, the requested November 15, 2004 submittal deadline can be met. We also acknowledge the desirability for the CEQA review and the plan adoption to be coordinated. Therefore, we believe that the additional 45 days sought by the District for submittal of the extreme area plan to EPA is warranted.

*Comment #3:* WSPA supported the reclassification request and our determination that the current sanction and FIP clocks, based on requirements for severe ozone nonattainment areas, will stop upon the effective date of the reclassification. WSPA, however, questioned our proposed schedules for submission of the extreme area ozone plan and revised NSR and Title V rules and stated that the schedules did not provide adequate time for preparation and adoption of the plan and amended rules. Instead of the schedules we proposed, WSPA requested that EPA establish one deadline for all required submittals and that the deadline be 18 months from the effective date of the final rule.

WSPA stated more time is necessary because EPA's proposed deadline does not allow sufficient time for the District to rely on the best possible information in completing the plan development and adoption process. WSPA cited existing performance problems associated with ozone episodes assessed in the CCOS program and concerns regarding the emissions inventory.

WSPA also requested that the same 18-month submittal date for the plan be established for the necessary NSR and Title V rule revisions. WSPA claimed that it was appropriate to set the deadline 18 months from the effective date of the rule because doing so would: (1) Be consistent with the suggested timeline for the extreme area plan submittal; and (2) help assure the District is not saddled with unnecessarily stringent federal NSR and Title V applicability provisions if the extreme area requirements would not apply in the District under EPA's final rule for transition to the 8-hour ozone standard.

*EPA Response to Comment #3:* EPA appreciates WSPA's support of the reclassification and we acknowledge their request that we require the extreme area plan and the NSR and Title V revisions be submitted 18 months from the effective date of the rule. As discussed below, however, we do not believe that the additional time is warranted.

First, regarding the plan submittal, WSPA's request for the full 18 months is not warranted in this case because the District has been working on the extreme area plan since 2002 and has indicated that they can meet the November 15, 2004 deadline. EPA believes that development of the plan should not be slowed or delayed any further than absolutely necessary and should remain a priority for all involved agencies. Thus, although we are not granting the full 18 months as requested by WSPA, we do believe, based on the District's comments above, that the 45 additional days requested by the District to submit the attainment demonstration are warranted.

In response to WSPA's request to extend the due date for the NSR and Title V rule revisions, we do not believe that an additional 6 months is necessary. Again, we are not granting WSPA's request because the District has indicated that they can meet a deadline of 12 months from the effective date of the reclassification.

Regarding WSPA's comment that additional data analysis is needed to confirm possible performance problems associated with the CCOS program, we recognize that CCOS data may not have advanced at the pace we had expected, but EPA does not believe this should prevent the State and District from moving forward with the attainment demonstration for the SJVAB.

### III. Consequences of Reclassification

#### A. Extreme Area Plan Requirements

Under CAA section 182(e), extreme area plans are required to meet all the requirements for severe area plans<sup>6</sup> plus the requirements for extreme areas, including, but not limited to: (1) A 10 ton per year major source definition; (2) additional reasonably available control technology (RACT) rules for sources subject to the new lower major source cutoff; (3) a new source review offset requirement of at least 1.5 to 1; (4) a rate of progress demonstration of emission reductions of ozone precursors of at least 3 percent per year from 2005 until

<sup>4</sup> On March 22, 2004 the Kern County Superior Court denied AIR's Petition for Writ of Mandate and Complaint for Declaratory Relief in *Association of Irrigated Residents v. San Joaquin Valley Unified APCD*, Case No. S-1500-CV 252128 KCT.

<sup>5</sup> The District also stated that they could meet our proposed schedule that they submit, through CARB, necessary revisions to their Title V and NSR rules within 12 months from the effective date of the final rule.

<sup>6</sup> The CAA specifically excludes certain severe area requirements from the extreme area requirements, e.g., section 182(c)(6),(7) and (8).

the attainment date;<sup>7</sup> (5) clean fuels for boilers as required for at CAA section 182(e)(3); and contingency measures. The plan must address the general nonattainment plan requirements in CAA section 172(c). The extreme area plan for the SJVAB must also contain adopted regulations and may also contain enforceable commitments to the extent consistent with Agency guidance, sufficient to make the required rate of progress and to attain the 1-hour ozone NAAQS as expeditiously as practicable but no later than November 15, 2010. The new attainment demonstration should be based on the best information available.

#### *B. NSR and Title V Program Revisions*

In addition to the required plan revisions discussed above, the District must revise its NSR rule to reflect the extreme area definitions for major new sources and major modifications and to increase the offset ratio for these sources from the ratio for severe areas in CAA section 182(d)(2) to 1.5 to 1. CAA section 182(e)(1) and (2). The District must also make any changes in its Title V operating permits program necessary to reflect the change in the threshold from 25 tpy for severe areas to 10 tpy for extreme areas.

#### *C. Sanctions and FIP*

For the reasons stated in our proposed rule, upon the effective date of today's final action, the federal offset sanction that was imposed on March 18, 2004 pursuant to CAA section 179(a) will be terminated. In addition, our action terminates the highway sanction and FIP clocks. These sanction and FIP clocks were started as a result of the Agency's October 2, 2002 finding that the State failed to submit the severe area attainment demonstration.

### **IV. EPA Action**

After fully considering all comments received on the proposed rule, EPA is taking final action to grant the State of California's request to voluntarily reclassify the SJVAB from a severe to an extreme 1-hour ozone nonattainment area. We are also taking final action to require the State to submit by November 15, 2004, an extreme area ozone plan for the areas within the SJVAB under the State's jurisdiction that provides for the attainment of the ozone NAAQS as expeditiously as practicable, but no later

than November 15, 2010. This plan must meet, among other general provisions of the CAA, the specific provisions of section 182(e), portions of which are discussed above. The State must also submit by May 16, 2005, revised Title V and New Source Review rules that reflect the extreme area requirements.

#### **V. Statutory and Executive Order Reviews**

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. EPA has determined that the voluntary reclassification would not result in any of the effects identified in Executive Order 12866 section 3(f). Voluntary reclassifications under section 181(b)(3) of the CAA are based solely upon requests by the State and EPA is required under the CAA to grant them. These actions do not, in and of themselves, impose any new requirements on any sectors of the economy. In addition, because the statutory requirements are clearly defined with respect to the differently classified areas, and because those requirements are automatically triggered by classifications, reclassification cannot be said to impose a materially adverse impact on State, local, or tribal governments or communities.

For the aforementioned reasons, this action is also not subject to Executive Order 32111, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001). Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). These actions do not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) for the following reasons: EPA is required to grant requests by states for voluntary reclassifications and such reclassifications in and of themselves do not impose any federal intergovernmental mandate. Several Indian tribes have reservations located within the boundaries of the SJVAB. EPA is responsible for the implementation of federal Clean Air Act programs in Indian country, including reclassifications. At the time of our proposed action, EPA notified all the affected tribal officials, and provided each the opportunity for consultation on a government-to-government basis, as

provided for by Executive Order 13175 (65 FR 67249, November 9, 2000). None of the tribes we contacted requested consultation or submitted comments on our proposed action.

Because EPA is required to grant requests by states for voluntary reclassifications and such reclassifications in and of themselves do not impose any federal intergovernmental mandate, this rule also does not have Federalism implications as it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). For these same reasons, this rule also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). These actions are also not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because they are not economically significant.

As discussed above, a voluntary reclassification under section 181(b)(3) of the CAA is based solely on the request of a state and EPA is required to grant such a request. In this context, it would thus be inconsistent with applicable law for EPA, when it grants a state's request for a voluntary reclassification to use voluntary consensus standards. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it

<sup>7</sup> The CAA does not allow the state to use the provision at CAA section 182(c)(2)(B)(ii) that would allow the state to demonstrate to the satisfaction of the Administrator that less than 3 percent reduction per year is approvable if the plan reflecting such lesser amount includes all measures that can feasibly be implemented in the area.

is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by June 15, 2004.

Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness

of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

#### List of Subjects in 40 CFR Part 81

Environmental protection, Air pollution control, National parks, Wilderness areas.

Dated: April 8, 2004.

**Laura Yoshii,**

*Acting Regional Administrator, Region IX.*

■ Part 81 of chapter I, title 40 of the Code of Federal Regulations is amended as follows:

#### PART 81—[AMENDED]

■ 1. The authority citation for part 81 continues to read as follows:

*Authority:* 42 U.S.C. 7401 *et seq.*

■ 2. In § 81.305 the "California-Ozone (1-Hour Standard)" table is amended by revising the entry for "San Joaquin Valley Area:" to read as follows:

#### § 81.305 California.

\* \* \* \* \*

#### CALIFORNIA—OZONE [1-HOUR STANDARD]

| Designated area  | Designation       |                     | Classification    |         |
|--|-------------------|---------------------|-------------------|---------|
|  | Date <sup>1</sup> | Type                | Date <sup>1</sup> | Type    |
| * * *  | * * *             | * * *               | * * *             | * * *   |
| San Joaquin Valley Area:   |                   |                     |                   |         |
| Fresno County .....  | 11/15/90          | Nonattainment ..... | 05/17/04          | Extreme |
| Kern County (part).  |                   |                     |                   |         |
| That portion of Kern County that lies west and north of a line described below:  | 11/15/90          | Nonattainment ..... | 05/17/04          | Extreme |
| Beginning at the Kern-Los Angeles County boundary and running north and east along the northwest boundary of the Rancho La Pliebre Land Grant to the point of intersection with the range line common to Range 16 West and Range 17 West, San Bernardino Base and Meridian; north along the range line to the point of intersection with the Rancho El Tejon Land Grant boundary; then southeast, northeast, and northwest along the boundary of the Rancho El Tejon Grant to the northwest corner of Section 3, Township 11 North, Range 17 West; then west 1.2 miles; then north to the Rancho El Tejon Land Grant boundary; then northwest along the Rancho El Tejon line to the southeast corner of Section 34, Township 32 South, Range 30 East, Mount Diablo Base and Meridian; then north to the northwest corner of Section 35, Township 31 South, Range 30 East; then northeast along the boundary of the Rancho El Tejon Land Grant to the southwest corner of Section 18, Township 31 South, Range 31 East; then east to the southeast corner of Section 13, Township 31 South, Range 31 East; then north along the range line common to Range 31 East and Range 32 East, Mount Diablo Base and Meridian, to the northwest corner of Section 6, Township 29 South, Range 32 East; then east to the southwest corner of Section 31, Township 28 South, Range 32 East; then north along the range line common to Range 31 East and Range 32 East to the northwest corner of Section 6, Township 28 South, Range 32 East, then west to the southeast corner of Section 36, Township 27 South, Range 31 East, then north along the range line common to Range 31 East and Range 32 East to the Kern-Tulare County boundary: |                   |                     |                   |         |
| Kings County .....   | 11/15/90          | Nonattainment ..... | 05/17/04          | Extreme |
| Madera County .....  | 11/15/90          | Nonattainment ..... | 05/17/04          | Extreme |
| Merced County .....  | 11/15/90          | Nonattainment ..... | 05/17/04          | Extreme |
| San Joaquin County .....   | 11/15/90          | Nonattainment ..... | 05/17/04          | Extreme |
| Stanislaus County .....  | 11/15/90          | Nonattainment ..... | 05/17/04          | Extreme |
| Tulare County .....  | 11/15/90          | Nonattainment ..... | 05/17/04          | Extreme |
| * * *  | * * *             | * * *               | * * *             | * * *   |

\* \* \* \* \*

[FR Doc. 04-8677 Filed 4-15-04; 8:45 am]

BILLING CODE 6560-50-P

**FEDERAL COMMUNICATIONS COMMISSION****47 CFR Part 73**

[DA 04-916; MB Docket No. 02-350; RM-10600]

**Radio Broadcasting Services; Sheffield, TX****AGENCY:** Federal Communications Commission.**ACTION:** Final rule.

**SUMMARY:** The Audio Division, at the request of Katherine Pyeatt, allots Channel 224C2 at Sheffield, Texas, as the community's first local FM service. Channel 224C2 can be allotted to Sheffield, Texas, in compliance with the Commission's minimum distance separation requirements with a site restriction of 15.7 km (9.8 miles) south of Sheffield. The coordinates for Channel 224C2 at Sheffield, Texas, are 30-33-15 North Latitude and 101-52-09 West Longitude. The Mexican government has concurred in this allotment. A filing window for Channel 224C2 at Sheffield, Texas, will not be opened at this time. Instead, the issue of opening this allotment for auction will be addressed by the Commission in a subsequent Order.

**DATES:** Effective May 20, 2004.**FOR FURTHER INFORMATION CONTACT:** Deborah Dupont, Media Bureau, (202) 418-2180.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Report and Order, MB Docket No. 02-350, adopted April 2, 2004, and released April 5, 2004. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Information Center, Portals II, 445 12th Street, SW., Room CY-A257, Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC, 20554, (202) 863-2893, facsimile (202) 863-2898, or via e-mail [qualexint@aol.com](mailto:qualexint@aol.com).

**List of Subjects in 47 CFR Part 73**

Radio, Radio broadcasting.

■ Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

**PART 73—RADIO BROADCAST SERVICES**

■ 1. The authority citation for Part 73 continues to read as follows:

*Authority:* 47 U.S.C. 154, 303, 334 and 336.

**§ 73.202 [Amended]**

■ 2. Section 73.202(b), the Table of FM Allotments under Texas, is amended by adding Sheffield, Channel 224C2.

Federal Communications Commission.

**John A. Karousos,***Assistant Chief, Audio Division, Media Bureau.*

[FR Doc. 04-8682 Filed 4-15-04; 8:45 am]

BILLING CODE 6712-01-P

**FEDERAL COMMUNICATIONS COMMISSION****47 CFR Part 73**

[DA 04-917; MM Docket No. 01-189; RM-10204]

**Radio Broadcasting Services; Annona and Mangum, TX****AGENCY:** Federal Communications Commission.**ACTION:** Final rule.

**SUMMARY:** The Audio Division, at the request of Annona Broadcasting Company, allots Channel 263A at Annona, Texas, as the community's first local FM service. This allotment at Annona, Texas, was adopted in lieu of the original proposal of Katherine Pyeatt, requesting the allotment of Channel 263A at Winnsboro, Texas. Channel 263A can be allotted to Annona, Texas, in compliance with the Commission's minimum distance separation requirements with a site restriction of 13.0 km (8.1 miles) west of Annona. The coordinates for Channel 263A at Annona, Texas, are 33-34-53 North Latitude and 95-03-19 West Longitude. A filing window for Channel 263A at Annona, Texas, will not be opened at this time. Instead, the issue of opening this allotment for auction will be addressed by the Commission in a subsequent Order.

**DATES:** Effective May 20, 2004.**FOR FURTHER INFORMATION CONTACT:** Deborah Dupont, Media Bureau, (202) 418-2180.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Report and Order, MM Docket No. 01-189, adopted April 2, 2004, and released April 5, 2004. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Information

Center, Portals II, 445 12th Street, SW., Room CY-A257, Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC, 20554, (202) 863-2893, facsimile (202) 863-2898, or via e-mail [qualexint@aol.com](mailto:qualexint@aol.com).

**List of Subjects in 47 CFR Part 73**

Radio, Radio broadcasting.

■ Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

**PART 73—RADIO BROADCAST SERVICES**

■ 1. The authority citation for Part 73 continues to read as follows:

*Authority:* 47 U.S.C. 154, 303, 334 and 336.

**§ 73.202 [Amended]**

■ 2. Section 73.202(b), the Table of FM Allotments under Texas, is amended by adding Annona, Channel 263A.

Federal Communications Commission.

**John A. Karousos,***Assistant Chief, Audio Division, Media Bureau.*

[FR Doc. 04-8683 Filed 4-15-04; 8:45 am]

BILLING CODE 6712-01-P

**FEDERAL COMMUNICATIONS COMMISSION****47 CFR Part 73**

[DA 04-915; MM Docket No. 01-182; RM-10202]

**Radio Broadcasting Services; Clarksville, TX, and Haworth, OK****AGENCY:** Federal Communications Commission.**ACTION:** Final rule.

**SUMMARY:** The Audio Division, at the request of Haworth Broadcasting Company, allots Channel 294A at Haworth, Oklahoma, as the community's first local FM service. This allotment at Haworth, Oklahoma, was adopted in lieu of the original proposal of Katherine Pyeatt, requesting the allotment of Channel 294A at Clarksville, Texas. Channel 294A can be allotted to Haworth, Oklahoma, in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.1 km (6.3 miles) south of Haworth. The coordinates for Channel 294A at Haworth, Oklahoma, are 33-45-33 North Latitude and 94-41-06 West Longitude. A filing window for Channel

294A at Haworth, Oklahoma, will not be opened at this time. Instead, the issue of opening this allotment for auction will be addressed by the Commission in a subsequent Order.

**DATES:** Effective May 20, 2004.

**FOR FURTHER INFORMATION CONTACT:** Deborah Dupont, Media Bureau, (202) 418-2180.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Report and Order, MM Docket No. 01-182, adopted April 2, 2004, and released April 5, 2004. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Information Center, Portals II, 445 12th Street, SW., Room CY-A257, Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC, 20554, (202) 863-2893, facsimile (202) 863-2898, or via e-mail [qualexint@aol.com](mailto:qualexint@aol.com).

#### List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

■ Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

#### PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for Part 73 continues to read as follows:

**Authority:** 47 U.S.C. 154, 303, 334 and 336.

##### § 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Oklahoma, is amended by adding Haworth, Channel 294A.

Federal Communications Commission.

**John A. Karousos,**

*Assistant Chief, Audio Division, Media Bureau.*

[FR Doc. 04-8684 Filed 4-15-04; 8:45 am]

**BILLING CODE 6712-01-P**

#### FEDERAL COMMUNICATIONS COMMISSION

##### 47 CFR Part 73

[DA 04-913; MM Docket No. 01-218; RM-10237]

#### Radio Broadcasting Services; Erick and Mangum, OK

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** The Audio Division, at the request of Erick Broadcasting Company, allots Channel 259C2 at Erick, Oklahoma, as the community's first local FM service. This allotment at Erick, Oklahoma, was adopted in lieu of the original proposal of Jeraldine Anderson, requesting the allotment of Channel 259C2 at Mangum, Oklahoma. Channel 259C2 can be allotted to Erick, Oklahoma, in compliance with the Commission's minimum distance separation requirements with a site restriction of 15.9 km (9.9 miles) south of Erick. The coordinates for Channel 259C2 at Erick, Oklahoma, are 35-04-01 North Latitude and 99-52-52 West Longitude. A filing window for Channel 259C2 at Erick, Oklahoma, will not be opened at this time. Instead, the issue of opening this allotment for auction will be addressed by the Commission in a subsequent Order.

**DATES:** Effective May 20, 2004.

**FOR FURTHER INFORMATION CONTACT:** Deborah Dupont, Media Bureau, (202) 418-2180.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Report and Order, MM Docket No. 01-218, adopted April 2, 2004, and released April 5, 2004. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Information Center, Portals II, 445 12th Street, SW., Room CY-A257, Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC 20554, (202) 863-2893, facsimile (202) 863-2898, or via e-mail [qualexint@aol.com](mailto:qualexint@aol.com).

#### List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

■ Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

#### PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for Part 73 continues to read as follows:

**Authority:** 47 U.S.C. 154, 303, 334 and 336.

##### § 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Oklahoma, is amended by adding Erick, Channel 259C2.

Federal Communications Commission.

**John A. Karousos,**

*Assistant Chief, Audio Division, Media Bureau.*

[FR Doc. 04-8686 Filed 4-15-04; 8:45 am]

**BILLING CODE 6712-01-P**

#### FEDERAL COMMUNICATIONS COMMISSION

##### 47 CFR Part 73

[DA 04-911, MM Docket No. 02-12; RM-10356, RM-10551, RM-10553, RM-10554]

#### Radio Broadcasting Services; Ash Fork, Chino Valley, Dolan Springs, Fredonia, Gilbert, Peach Springs, Seligman and Tusayan, AZ, Moapa Valley, NV, and Beaver and Cedar City, UT

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule, grant of petition for reconsideration.

**SUMMARY:** In response to a Petition for Reconsideration jointly filed by NPR Phoenix, LLC and Prescott Radio Partners, this document substitutes Channel 280C1 for Channel 280C2 at Gilbert, Arizona, and modifies the Station KEDJ license to specify operation on Channel 280C1. In order to accommodate the Channel 280C1 allotment at Gilbert, this document substitutes Channel 232C3 for Channel 280C3 at Chino Valley, Arizona, and modifies the Station KFPB license to specify operation on Channel 232C3. See 68 FR 69327, December 12, 2003. The reference coordinates for the Channel 280C1 allotment at Gilbert, Arizona, are 33-25-39 and 111-28-03. The reference coordinates for the Channel 232C3 allotment at Chino Valley, Arizona, are 34-52-03 and 112-33-04. With this action, the proceeding is terminated.

**DATES:** Effective May 20, 2004.

**FOR FURTHER INFORMATION CONTACT:** Robert Hayne, Media Bureau (202) 418-2177.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the *Memorandum Opinion and Order* in MM Docket No. 02-12 adopted April 2, 2004, and released April 5, 2004. The full text of this decision is available for inspection and copying during normal business hours in the FCC Reference Information Center at Portals II, CY-A257, 445 12th Street, SW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY-B402,

Washington, DC 20554, telephone (202) 863-2893, facsimile (202) 863-2898, or via e-mail [qualixint@aol.com](mailto:qualixint@aol.com).

#### List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

■ Part 73 of the Code of Federal Regulations is amended as follows:

#### PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for Part 73 continues to read as follows:

**Authority:** 47 U.S.C. 154, 303, 334 and 336.

##### § 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Arizona, is amended by removing Channel 280C3 and by adding Channel 232C3 at Chino Valley and by removing Channel 280C2 and by adding Channel 280C1 at Gilbert.

Federal Communications Commission.

**John A. Karousos,**

*Assistant Chief, Audio Division, Media Bureau.*

[FR Doc. 04-8687 Filed 4-15-04; 8:45 am]

**BILLING CODE 6712-01-P**

#### FEDERAL COMMUNICATIONS COMMISSION

##### 47 CFR Part 73

[DA 04-912; MM Docket No. 01-152; RM-10168]

#### Radio Broadcasting Services; Encinal, TX

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** The Audio Division, at the request of Charles Crawford, allots Channel 259A at Encinal, Texas, as the community's second local FM service. Channel 259A can be allotted to Encinal, Texas, in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.9 km (6.8 miles) east of Encinal. The coordinates for Channel 259A at Encinal, Texas, are 28-03-51 North Latitude and 99-14-47 West Longitude. The Mexican government has concurred in this allotment. A filing window for Channel 259A at Encinal, TX, will not be opened at this time. Instead, the issue of opening this allotment for auction will be addressed by the Commission in a subsequent Order.

**DATES:** Effective May 20, 2004.

**FOR FURTHER INFORMATION CONTACT:** Deborah Dupont, Media Bureau, (202) 418-2180.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Report and Order, MM Docket No. 01-152, adopted April 2, 2004, and released April 5, 2004. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Information Center, Portals II, 445 12th Street, SW., Room CY-A257, Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC 20554, (202) 863-2893, facsimile (202) 863-2898, or via e-mail [qualexint@aol.com](mailto:qualexint@aol.com).

#### List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

■ Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

#### PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for Part 73 continues to read as follows:

**Authority:** 47 U.S.C. 154, 303, 334 and 336.

##### § 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Texas, is amended by adding Channel 259A at Encinal.

Federal Communications Commission.

**John A. Karousos,**

*Assistant Chief, Audio Division, Media Bureau.*

[FR Doc. 04-8701 Filed 4-15-04; 8:45 am]

**BILLING CODE 6712-01-P**

#### DEPARTMENT OF TRANSPORTATION

##### National Highway Traffic Safety Administration

##### 49 CFR Part 579

[Docket No. NHTSA 2001-8677; Notice 9]

**RIN 2127-AJ38**

#### Reporting of Information and Documents About Potential Defects

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), DOT.  
**ACTION:** Final rule; response to petition for reconsideration.

**SUMMARY:** This document grants a petition requesting a clarification of the definition of "field report" under regulations that implement the early warning reporting provisions of the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act.

**DATES:** Effective Date: The effective date of the amendments made by this final rule is May 17, 2004. Petitions for Reconsideration: Petitions for reconsideration of any amendments made by this final rule must be received not later than June 1, 2004.

**ADDRESSES:** Petitions for reconsideration of the amendments made by this final rule must refer to the docket or Regulatory Identification Number (RIN) for this rulemaking, and be addressed to the Administrator, National Highway Traffic Safety Administration (NHTSA). You may submit a petition by any of the following methods:

- **Web site:** <http://dms.dot.gov>.

Follow the instructions for submitting comments on the DOT electronic docket site.

- **Fax:** 1-202-493-2251.

- **Mail:** Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL-401, Washington, DC 20590-001.

- **Hand Delivery:** Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

- **Federal rulemaking Portal:** Go to <http://www.regulations.gov>. Follow the online instructions for submitting petitions.

**FOR FURTHER INFORMATION CONTACT:** For non-legal issues, contact Jonathan White, Office of Defects Investigation, NHTSA (phone: 202-366-5226). For legal issues, contact Andrew DiMarsico, Office of Chief Counsel, NHTSA (phone: 202-366-5263).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

On July 10, 2002, the National Highway Traffic Safety Administration (NHTSA) published a final rule implementing the early warning reporting (EWR) provisions of the Transportation Recall Enhancement Accountability, and Documentation (TREAD) Act, 49 U.S.C. 30166(m) (67 FR 45822).

We received a number of petitions for reconsideration of the final rule, and have responded to most of them in separate rulemaking notices. In response to one of those notices (Notice 4, 68 FR 18136, April 15, 2003), we received one additional petition for reconsideration of the definition of "field report" which was revised by Notice 4.

##### II. Petition for Reconsideration of the Definition of "Field Report"

In Notice 4, we redefined "field report" as follows:

Field report means a communication in writing, including communications in electronic form, from an employee or representative of a manufacturer of motor vehicles or motor vehicle equipment, with respect to a vehicle or equipment that has been transported beyond the direct control of the manufacturer, a dealer, an authorized service facility of such manufacturer, or an entity known to the manufacturer as owning or operating a fleet, to a manufacturer, regarding the failure, malfunction, lack of durability, or other performance problem of a motor vehicle or motor vehicle equipment, or any part thereof, produced for sale by that manufacturer, regardless of whether verified or assessed to be lacking in merit, but does not include a document covered by the attorney-client privilege or the work product exclusion.

Stephen E. Selander of Southfield, Michigan, filed a petition for reconsideration of the definition of "field report," with the comment that "a technical amendment is desirable to clarify the definition." Mr. Selander would redefine "field report" as:

a communication in writing, including communications in electronic form, from an employee or representative of a manufacturer of motor vehicles or motor vehicle equipment, a dealer or authorized service facility of such manufacturer, or an entity that owns or operates a fleet, to the manufacturer regarding the failure, malfunction, lack of durability, or other performance problem of a motor vehicle or motor vehicle equipment, or any part thereof, produced for sale by that manufacturer and transported beyond the direct control of the manufacturer, regardless of whether verified or assessed to be lacking in merit, but does not include documents covered by the attorney-client privilege or the work product exclusion.

The definition suggested by Mr. Selander simply rearranges the elements of the existing definition in a manner that, in our opinion, does clarify its meaning. However, the definition contains one substantive change that we do not accept. With respect to fleets, we note that he would replace the existing phrase "an entity known to the manufacturer as owning or operating a fleet" with "an entity that owns or operates a fleet." In Notice 4, we redefined the definition of "field report" adopted on July 10, 2002, to include the phrase "known to the manufacturer" in recognition of the assertion by the Alliance of Automobile Manufacturers (the Alliance) that "it is usually not obvious on the face of a written complaint from a customer or other

person making the complaint whether that customer owns ten or more vehicles of the same make, model, and model year" (68 FR at 18138). While we are amenable to rearranging the elements of the definition in the manner suggested by Mr. Selander, we are retaining the phrase "known to the manufacturer" in the clause relating to fleets. Finally, in the phrase that ends the definition, relating to the attorney-client privilege and work product exclusions, Mr. Selander uses the plural "documents" where the existing definition uses the singular, "a document." Upon reflection, we think "any" document preferable. Accordingly, we are granting the petition for reconsideration and amending the definition of "field report" to read as follows:

Field report means a communication in writing, including communications in electronic form, from an employee or representative of a manufacturer of motor vehicles or motor vehicle equipment, a dealer or authorized service facility of such manufacturer, or an entity known to the manufacturer as owning or operating a fleet, to the manufacturer regarding the failure, malfunction, lack of durability, or other performance problem of a motor vehicle or motor vehicle equipment, or any part thereof, produced for sale by that manufacturer and transported beyond the direct control of the manufacturer, regardless of whether verified or assessed to be lacking in merit, but does not include any document covered by the attorney-client privilege or the work product exclusion.

### III. Privacy Act Statement

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or you may visit <http://dms.dot.gov>.

### IV. Rulemaking Analyses

This notice makes technical changes to the definition of "field report" adopted in Notice 4. The changes made to the early warning reporting regulation by this notice do not alter the burdens and impacts discussed in the Regulatory Analyses in Notice 4. To the extent that the Regulatory Analyses may be relevant to this minor change, the Analyses in

Notice 4 (68 FR 18140–18142) are hereby incorporated by reference.

### List of Subjects

#### 49 CFR Part 579

Imports, Motor vehicle safety, Motor vehicles, Reporting and recordkeeping requirements.

■ For the reasons set out in the preamble, 49 CFR part 579 is amended as follows:

### PART 579—REPORTING OF INFORMATION AND COMMUNICATIONS ABOUT POTENTIAL DEFECTS

■ 1. The authority citation for part 579 continues to read as follows:

Sec. 3, Pub. L. 106–414, 114 Stat. 1800 (49 U.S.C. 30102–103, 30112, 30117–121, 30166–167); delegation of authority at 49 CFR 1.50.

#### Subpart A—General

■ 2. Section 579.4(c) is amended by revising the definition of "Field report," to read as follows:

#### § 579.4 Terminology.

\* \* \* \* \*

(c) Other terms. \* \* \*

\* \* \* \* \*

Field report means a communication in writing, including communications in electronic form, from an employee or representative of a manufacturer of motor vehicles or motor vehicle equipment, a dealer or authorized service facility of such manufacturer, or an entity known to the manufacturer as owning or operating a fleet, to the manufacturer regarding the failure, malfunction, lack of durability, or other performance problem of a motor vehicle or motor vehicle equipment, or any part thereof, produced for sale by that manufacturer and transported beyond the direct control of the manufacturer, regardless of whether verified or assessed to be lacking in merit, but does not include any document covered by the attorney-client privilege or the work product exclusion.

\* \* \* \* \*

Issued on: April 13, 2004.

Jeffrey W. Runge,  
Administrator.

[FR Doc. 04–8716 Filed 4–15–04; 8:45 am]

BILLING CODE 4910–59–P

# Proposed Rules

Federal Register

Vol. 69, No. 74

Friday, April 16, 2004

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## FEDERAL DEPOSIT INSURANCE CORPORATION

### 12 CFR Part 303

RIN 3064-AC80

#### Definition of "Deposit"; Stored Value Cards

**AGENCY:** Federal Deposit Insurance Corporation (FDIC).

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The FDIC is publishing for notice and comment a proposed rule that would clarify the meaning of "deposit" as that term relates to funds at insured depository institutions underlying stored value cards. This proposed rule would add a new section to part 303 of title 12 of the Code of Federal Regulations and would replace General Counsel's Opinion No. 8, published by the FDIC in 1996. Since the publication of General Counsel's Opinion No. 8, the banking industry has developed new types of stored value card systems. As a result, this new section is necessary to provide guidance to the industry and the public as to when funds underlying stored value cards will satisfy the definition of "deposit" at section 3(l) of the Federal Deposit Insurance Act. This new section would promote accuracy and consistency by insured depository institutions in reporting "deposits."

**DATES:** Written comments must be received by the FDIC no later than July 15, 2004.

**ADDRESSES:** All comments should be addressed to Robert E. Feldman, Executive Secretary (Attention: Comments/Legal ESS), Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429. Comments may be hand-delivered to the guard station located at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m. Also, comments may be sent by e-mail to [comments@fdic.gov](mailto:comments@fdic.gov). Comments may be inspected and photocopied in the FDIC Public

Information Center, Room 100, 801 17th Street, NW., Washington, DC, on business days between 9 a.m. and 4:30 p.m. The FDIC may post comments at its Internet site at the following address: <http://www.fdic.gov/regulations/laws/federal/propose.html>.

#### FOR FURTHER INFORMATION CONTACT:

Christopher L. Hencke, Counsel, Legal Division, (202) 898-8839, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

#### SUPPLEMENTARY INFORMATION:

##### I. Introduction

For purposes of the Federal Deposit Insurance Act ("FDI Act"), the term "deposit" is defined at section 3(l) (12 U.S.C. 1813(l)). In 1996, the FDIC interpreted this term as it relates to funds at insured depository institutions underlying "stored value cards." The FDIC's interpretation is set forth in General Counsel's Opinion No. 8 ("GC8") (discussed below in Section III). See 61 FR 40490 (August 2, 1996).

GC8 did not address all types of stored value card systems involving insured depository institutions. These systems were new in 1996 and many of the systems currently offered by insured depository institutions were developed after the issuance of the FDIC's opinion. The development of new systems has created a need for additional guidance as to whether the underlying funds qualify as "deposits." Although the proposed rule would provide such additional guidance, it would retain the basic principles set forth in GC8 and extend these principles to new types of stored value card systems.

An example of a system not addressed in GC8 is where a company maintains an account at an insured depository institution for the purpose of making payments on stored value cards issued by that company (and not issued by the insured depository institution). For reasons explained below, the FDIC believes that the funds in such accounts are "deposits."

Another system not addressed in GC8 is one in which an insured depository institution—in connection with stored value cards issued by the insured depository institution (and not issued by another company)—maintains a pooled self-described "reserve account" (representing the institution's liabilities to multiple cardholders) but also maintains individual subaccounts (with

each subaccount representing the institution's liability to a particular cardholder). For reasons discussed below, the FDIC proposes to add a new section to part 303 of title 12 of the Code of Federal Regulations that would classify the funds in such systems as "deposits." The FDIC seeks comments on the proposed rule.

GC8 also did not address the insurability of the funds underlying "payroll cards." As discussed below, the FDIC does not propose to adopt any rule dealing specifically with "payroll cards." Rather, the FDIC proposes to apply the same rules governing the insurability of the funds underlying other types of stored value cards.

As a preliminary matter, the meaning of certain terms must be clarified. In this notice of proposed rulemaking, companies that issue stored value cards—other than insured depository institutions—are referred to as "sponsoring companies." This term is used in the proposed rule. In referring to the "issuance" of stored value cards by insured depository institutions or sponsoring companies, the FDIC means the distribution of cards to cardholders (directly or through an agent) and the making of a promise to the cardholder that the card may be used to transfer the underlying funds (*i.e.*, the funds received by the issuer in exchange for the card's issuance) to one or more merchants at the merchants' point of sale terminals. Also, in using the term "stored value card," the FDIC means a device that enables the user to effect such transfers of funds at merchants' point of sale terminals. The definition of "stored value card" is discussed in detail in Section VI.<sup>1</sup>

<sup>1</sup> This proposed rulemaking does not apply to "gift cards" offered by retailers in "closed systems." Although such cards may be referred to as "stored value cards," a "gift card" offered by a retailer (in a "closed system") is different than a "stored value card" offered by a bank (in an "open system") because the former card—unlike the latter card—does not move through a "clearing" process. In other words, the "value" on the card does not depend on whether a bank holds sufficient funds to back-up the card. Indeed, the retailer who accepts the card does not expect to receive payment through a bank. On the contrary, the retailer has been prepaid through the retailer's sale of the card. Through such sale, the ownership of the cardholder's funds passes from the cardholder to the retailer. Of course, the retailer might then place the collected funds into a deposit account at an FDIC-insured depository institution but any such placement of funds would have no effect on the "value" of the card or the cardholder's ability to use the card to collect the promised goods or services.

This proposed rulemaking may not resolve all questions concerning the definition of “deposit” as that term relates to funds underlying stored value cards and other stored value products. Developments in the banking industry may lead to new questions. The process of defining “deposit”—in response to such developments—may be evolutionary. In any event, this rulemaking will resolve certain specific questions that have arisen since the publication of GC8. In the event that questions arise that are not resolved by this rulemaking, the FDIC may need to resolve such questions on a case-by-case basis.

Also, this rulemaking is not intended to address any issue except the meaning of “deposit” under the FDI Act but the FDIC welcomes comments on any issues that may be related to the meaning of “deposit” in the context of stored value cards.<sup>2</sup>

The determination of whether certain funds are “deposits” requires an analysis of the statutory definition of “deposit” at section 3(l) of the FDI Act. The relevant portions of the statutory definition are quoted below. The recitation below of the relevant statutory language is followed by a detailed summary of the FDIC’s interpretation of this language in GC8. This summary is followed by an analysis of the new types of stored value card systems.

## II. The Statutory Definition

The definition of “deposit” at section 3(l) of the FDI Act is a broad one. At paragraph 3(l)(1), the term “deposit” is defined in part as “the unpaid balance of money or its equivalent received or held by a bank or savings association in the usual course of business and for which it has given or is obligated to give credit, either conditionally or unconditionally, to a commercial, checking, savings, time, or thrift account, or which is evidenced by its certificate of deposit, thrift certificate, investment certificate, certificate of

indebtedness, or other similar name.

\* \* \* 12 U.S.C. 1813(l)(1).

At paragraph 3(l)(3), the term “deposit” is defined in part as “money received or held by a bank or savings association, or the credit given for money or its equivalent received or held by a bank or savings association, in the usual course of business for a special or specific purpose, regardless of the legal relationship thereby established, including without being limited to, escrow funds, funds held as security for an obligation due to the bank or savings association or others (including funds held as dealers reserves) or for securities loaned by the bank or savings association, funds deposited by a debtor to meet maturing obligations, funds deposited as advance payment on subscriptions to United States Government securities, funds held for distribution or purchase of securities, funds held to meet its acceptances or letters of credit, and withheld taxes.

\* \* \* 12 U.S.C. 1813(l)(3).

In addition, paragraph 3(l)(5) provides that the FDIC may in consultation with other financial regulatory agencies define “deposit” through regulation. Specifically, paragraph 3(l)(5) provides that the term “deposit” includes “such other obligations of a bank or savings association as the Board of Directors [of the FDIC], after consultation with the Comptroller of the Currency, Director of the Office of Thrift Supervision, and the Board of Governors of the Federal Reserve System, shall find and prescribe by regulation to be deposit liabilities by general usage.” \* \* \* 12 U.S.C. 1813(l)(5). In accordance with paragraph 3(l)(5), the FDIC has invited comments from the other federal banking agencies in connection with this proposed rulemaking.

In GC8, the FDIC relied in large part upon paragraphs 3(l)(1) and 3(l)(3) (quoted above) in determining whether the funds underlying certain types of stored value cards qualified as “deposits.” A summary of GC8 is set forth below.

## III. General Counsel’s Opinion No. 8

GC8 is an interpretation of the term “deposit” as that term relates to funds underlying stored value cards. In GC8, the FDIC identified several types of stored value card systems involving insured depository institutions. The FDIC made no attempt, however, to identify all types of systems. Moreover, the FDIC made no attempt to analyze systems offered by particular insured depository institutions. Rather, the FDIC described a mechanism or framework for determining when the funds underlying stored value cards may or

may not qualify as “deposits.” See 61 FR 40490. This framework was based upon information available to the FDIC in 1996. Since that time, the banking industry has developed new types of stored value cards.

In GC8, the FDIC identified four types of stored value card systems: (1) A “Bank Primary-Reserve System”; (2) a “Bank Primary-Customer Account System”; (3) a “Bank Secondary-Advance System”; and (4) a “Bank Secondary-Pre-Acquisition System.” Each of these systems is summarized below.

In a “Bank Primary-Reserve System,” the insured depository institution issues stored value cards in exchange for cash from the cardholders. The depository institution does not maintain an individual account for each cardholder; rather, the institution maintains a pooled “reserve account” for all cardholders. In making payments to merchants or other payees (as the cardholders use their cards to purchase goods or services), the depository institution disburses funds from this “reserve account.” In GC8, the FDIC determined that such funds held by the insured depository institution do not satisfy the statutory definition of “deposit” at section 3(l) of the FDI Act. In making this determination, the FDIC specifically addressed the applicability of paragraphs 3(l)(1) and 3(l)(3) (quoted above). First, in finding that the funds do not satisfy paragraph 3(l)(1), the FDIC found that the stored value cards are not structured so that the institution credits a conventional commercial, checking, savings, time or thrift account. Rather, the institution credits the pooled “reserve account.” See 61 FR 40490. The FDIC noted that “the sample agreements which the FDIC staff has reviewed clearly indicate that the parties to a stored value card agreement \* \* \* do not intend that the funds be credited to one of the five enumerated accounts.” Id. Second, in finding that the funds do not satisfy paragraph 3(l)(3), the FDIC determined that the purpose of the funds is not sufficiently “special or specific” because the funds might be disbursed to any number of merchants as the cardholders use their cards to engage in miscellaneous and unrelated transactions. See 61 FR 40490. The FDIC noted that the holding of funds by a depository institution to meet obligations to numerous transferees does not appear to be as specific a purpose as the examples in the statute and case law. See id. The FDIC concluded that the funds in this type of system are not “deposits.” See 61 FR 40490.

from the retailer. To the extent that the retailer places funds into an account at an FDIC-insured depository institution, the funds would be insurable to the retailer (not the cardholder) in accordance with the ordinary deposit insurance rules at 12 CFR part 330. See 12 CFR 330.11(a) (providing that the deposit accounts of a corporation are added together and insured up to \$100,000).

<sup>2</sup> The meaning of “deposit” is relevant under the FDI Act for assessment and insurance purposes. There are a number of other issues, not addressed in this proposed rulemaking, which are of great importance to the FDIC and which the FDIC will continue to monitor as appropriate. Such issues include, but are not limited to, systemic risk, security, electronic fund transfer matters, reserve requirements, counterfeiting, monetary policy and money laundering.

A "Bank Primary-Customer Account System" is similar to a "Bank Primary-Reserve System" in that the insured depository institution issues stored value cards in exchange for cash from the cardholders. The accounting techniques in the two systems, however, are different. In a "Bank Primary-Customer Account System," the depository institution does not maintain a pooled "reserve account" for all cardholders. Rather, the institution maintains an individual account for each cardholder. Citing paragraph 3(l)(1) of the statutory definition (quoted above), the FDIC in GC8 determined that the funds in these individual accounts are "deposits." See 61 FR 40490.

In a "Bank Secondary-Advance System," the insured depository institution acts as an intermediary in collecting funds from cardholders in exchange for stored value cards issued by a third party or sponsoring company. The funds are held by the depository institution for a short period of time, then forwarded to the third party. See 61 FR 40490. Later, when the cardholder uses the stored value card to make a purchase from a merchant, the third party (and not the depository institution) sends the appropriate amount of money to the merchant. In GC8, the FDIC determined that the funds collected by the depository institution are "deposits" belonging to the third party for the brief period before the funds are forwarded to the third party. The funds are not "deposits" belonging to the cardholders because the institution's liability for these funds is owed to the third party for whom the institution is temporarily holding the funds. See 61 FR 40490.

Similarly, in a "Bank Secondary-Pre-Acquisition System," the insured depository institution provides cardholders with cards issued by a third party or sponsoring company. Prior to selling the cards to the cardholders, however, the depository institution purchases the cards from the third party. See 61 FR 40490. In this respect, the system is different than a "Bank Secondary-Advance System." When the depository institution resells the cards to the cardholders, no money is owed to the third party. For this reason, the depository institution is free to retain the funds collected from the cardholders. Later, when a cardholder uses his/her stored value card to make a purchase from a merchant, the third party and not the depository institution sends the appropriate amount of funds to the merchant.

In GC8, the FDIC determined that the funds collected by the depository institution in a "Bank Secondary-Pre-

Acquisition System" are not "deposits." See 61 FR 40490. This conclusion was based upon the fact that the depository institution, in collecting funds from cardholders, does not assume a responsibility to return or disburse the funds to the cardholders or the third party or any other party. Rather, the depository institution merely sells the right to collect funds from the third party (*i.e.*, the issuer of the cards). Thus, the funds underlying the stored value cards are held by the third party, not the depository institution. Under these circumstances, no "deposits" exist at the depository institution. See 12 U.S.C. 1813(l)(1) (defining "deposit" as an "unpaid balance of money or its equivalent"); 12 U.S.C. 1813(l)(3) (providing that the term "deposit" does not include "funds which are received by the bank or savings association for immediate application to the reduction of an indebtedness to the receiving bank or savings association, or under condition that the receipt thereof immediately reduces or extinguishes such an indebtedness").

#### IV. New Types of Stored Value Cards

As a result of developments in the banking industry, the classification scheme described in the previous section is at a minimum incomplete, and may be obsolete. That is, this classification scheme does not include all types of stored value card systems involving insured depository institutions. Examples of new types of systems are described below:

*Example A:* A sponsoring company issues cards to cardholders in exchange for cash. The company then places the cash into an account at an insured depository institution. Through an agreement between the company and the depository institution, the account is designated as a "reserve account." The company uses the funds in the self-described "reserve account" to make payments to merchants as the cardholders use their cards. In this manner, the company satisfies its obligations as the issuer of the cards.

*Example B:* Through kiosks at retail stores, an insured depository institution issues cards to cardholders in exchange for cash. In connection with the issuance of these cards, the depository institution maintains a self-described "reserve account." At the same time, the institution maintains an individual account or subaccount for each cardholder. When a cardholder uses his/her card to purchase goods or services from a merchant, the "reserve account" is debited and the individual account or subaccount also is debited. Account statements are made available to the

cardholders so that they may check their balances.

*Example C:* In paying wages to its employees, a company distributes "payroll cards" in lieu of checks. Prior to the distribution of the cards, the company places funds at an insured depository institution. Briefly, the funds are held in a self-described "funding account." After the distribution of the cards (on payday), however, the funds are transferred to individual accounts for the various employees. When an employee uses his/her card to purchase goods or services, funds are disbursed from the employee's individual account to the merchant.

None of the cards or systems described above was addressed in GC8. In Example A, the system is similar to a "Bank Primary-Reserve System" in that the insured depository institution maintains a "reserve account." The system is different, however, in that the issuer of the cards is a sponsoring company and not the insured depository institution.

In Example B, the system is similar to a "Bank Primary-Reserve System" in that the insured depository institution maintains a "reserve account." The system is different, however, in that the depository institution also maintains an account or subaccount for each cardholder. In this respect, the system is similar to a "Bank Primary-Customer Account System."

Finally, in Example C, the system is different than the systems described in GC8 because none of the systems in GC8 involved the payment of wages by an employer. The involvement of the employer raises questions as to (1) whether the issuer of the cards is the employer as opposed to the depository institution; and (2) whether the owner of the funds placed at the depository institution is the employer as opposed to the employees.

The examples above may or may not be typical. Possibly, the stored value card systems offered by some banks differ from the systems above in a variety of ways. For instance, a "payroll card" system might exist in which the funds are not transferred to individual accounts. Rather, the system might be designed so that the funds are held in a pooled "reserve account." This pooled account might or might not include individual subaccounts. The cardholders might or might not receive periodic statements. The cardholders might or might not possess the ability to reload their cards. The possibilities are numerous.

In any event, GC8 did not address all types of stored value card systems involving insured depository

institutions. Additional guidance is needed as to whether the underlying funds held by depository institutions qualify as “deposits.” Below, this issue is discussed in connection with the three types of systems described in the examples above.

#### *A. Accounts Funded by Sponsoring Companies*

A type of system not addressed in GC8 is a system in which (1) Consumers place funds with a sponsoring company in exchange for stored value cards; and (2) in order to make payments on the stored value cards, the sponsoring company maintains an account at an insured depository institution. In this system, the issuer of the cards is the sponsoring company (as in the “Bank Secondary-Advance System” and the “Bank Secondary-Pre-Acquisition System”) and not the depository institution.

The question is whether the funds placed at the insured depository institution, in this type of system, are “deposits” as defined at section 3(1) of the FDI Act. For the reasons explained below, the FDIC believes that the funds are “deposits” under paragraph 3(1)(1) and paragraph 3(1)(3).

*Paragraph 3(1)(1).* As previously quoted, paragraph 3(1)(1) defines “deposit” as “[t]he unpaid balance of money or its equivalent received or held by a bank or savings association in the usual course of business and for which it has given or is obligated to give credit, either conditionally or unconditionally, to a commercial, checking, savings, time, or thrift account. \* \* \*” 12 U.S.C. 1813(1)(1). In the case of an account funded by a sponsoring company for the purpose of making payments on stored value cards, the account is a “commercial account” under this paragraph because the account is owned for a commercial purpose by a commercial enterprise (*i.e.*, the sponsoring company). The account is not a non-deposit “general liability account” maintained by the depository institution. *See* 61 FR 40490 (recognizing a distinction between a “commercial, checking, savings, time, or thrift account” under paragraph 3(1)(1) and a “general liability account”).

*Paragraph 3(1)(3).* As previously quoted, paragraph 3(1)(3) provides that the term “deposit” includes “money received or held by a bank or savings association, or the credit given for money or its equivalent received or held by a bank or savings association, in the usual course of business for a special or specific purpose, regardless of the legal relationship thereby established, including without being limited to

\* \* \* funds deposited by a debtor to meet maturing obligations. \* \* \*” 12 U.S.C. 1813(1)(3). In GC8, the FDIC found that this paragraph is not satisfied by a pooled “reserve account” funded by multiple cardholders for the purpose of engaging in miscellaneous unrelated transactions. *See* 61 FR 40490. In the case of an account funded by a sponsoring company, however, paragraph 3(1)(3) is satisfied because the single intended purpose is to hold the funds for the sponsoring company. Under paragraph 3(1)(3), this “special or specific purpose” means that the liabilities represented by the account at the insured depository institution (whether or not the account is described as a “reserve account”) are “deposits.”

The conclusion above is supported by the case law. The purpose of funding stored value cards is no less “special or specific” than the purposes recognized by the courts as “special or specific.” *See* Seattle-First National Bank v. FDIC, 619 F. Supp. 1351 (W.D. Okla. 1985) (funding a participated loan is a “special or specific purpose”); *FDIC v. European American Bank & Trust Co.*, 576 F. Supp. 950 (S.D.N.Y. 1983) (funding an interbank clearinghouse payment is a “special or specific purpose”). The conclusion above is supported by GC8 as well. *See* 61 FR 40490 (even in the case of a “reserve account” funded by cardholders, the funds are “deposits” if each cardholder’s “ultimate payee can only be one predetermined party”). Finally, the conclusion above is supported by one of the examples of a “deposit” specifically mentioned in paragraph 3(1)(3): “funds deposited by a debtor to meet maturing obligations.” In the case of an account funded by a sponsoring company, the funds are equivalent to “funds deposited by a debtor to meet maturing obligations” because the funds are deposited by the sponsoring company to meet that company’s obligations to the cardholders as the cardholders use their cards.

In conclusion, the FDIC believes that funds placed at an insured depository institution by a sponsoring company for the purpose of making payments on stored value cards are “deposits.” This conclusion is incorporated in the proposed rule.

A separate question is whether the “deposits” in such a system can be insured on a “pass-through” basis to the cardholders (as opposed to being insured to the sponsoring company). Under the FDIC’s insurance regulations, funds deposited by an agent or custodian on behalf of a principal or principals are insured not to the agent but to the principal(s) (in aggregation

with any other deposits owned by the principal(s) at the same insured depository institution). *See* 12 CFR 330.7(a). In other words, the insurance coverage “passes through” the agent to the principal(s). Such “pass-through” coverage is not available, however, unless certain requirements are satisfied. First, the fiduciary status of the nominal accountholder must be disclosed in the deposit account records of the insured depository institution. *See* 12 CFR 330.5(b)(1). Second, the interests of the principals or actual owners must be ascertainable either from the account records of the insured depository institution or records maintained in good faith by the agent or other party. *See* 12 CFR 330.5(b)(2). Third, the agency or custodial relationship must be genuine. Through this relationship, the deposit actually must belong not to the nominal agent but to the alleged owners. *See* 12 CFR 330.3(h); 12 CFR 330.5(a)(1).

Under the rules summarized above, an account funded by a sponsoring company for the purpose of making payments to cardholders cannot be insured on a “pass-through” basis to the cardholders unless (1) the account records reflect a custodial relationship between the sponsoring company and the cardholders (*e.g.*, “Sponsoring Company as Custodian for Cardholders”); (2) the depository institution or the sponsoring company or some other party maintains records reflecting the interest of each cardholder; and (3) the deposit is owned in fact by the cardholders.

Satisfaction of the third requirement will depend upon the agreements between the sponsoring company and the cardholders. One factor would be whether the sponsoring company retains the right to recover the funds under certain circumstances (*e.g.*, upon the expiration of a card). Such a right would indicate that the funds in the account actually belong to the sponsoring company, not the cardholders. If the funds belong to the sponsoring company, “pass-through” coverage will be unavailable.

#### *B. Pooled “Reserve Accounts” With Individual Subaccounts*

As previously discussed, the FDIC in GC8 identified two types of systems in which the stored value cards are issued by an insured depository institution. These systems are the “Bank Primary-Reserve System” and the “Bank Primary-Customer Account System.” In the former system, the insured depository institution maintains a pooled “reserve account” for all cardholders. In the latter system, the

insured depository institution maintains an individual account for each cardholder. Under GC8, only the funds in the latter system are “deposits.”

The FDIC has learned that some insured depository institutions have combined the two systems in issuing stored value cards. The hybrid system used by these depository institutions is similar to a “Bank Primary-Reserve System” in that the institution maintains a pooled self-described “reserve account” for all cardholders. On the other hand, the system also is similar to a “Bank Primary-Customer Account System” in that the institution maintains a subaccount for each cardholder. In some cases, the depository institution maintains the subaccounts through a processing agent. In this notice of proposed rulemaking, the term “subaccount” is used to mean any supplemental records maintained by the insured depository institution (directly or through an agent) that enable the institution to determine the amounts of money owed to particular persons (*i.e.*, that enable the institution to calculate a balance for each of the persons who holds a card).

Through this notice of proposed rulemaking, the FDIC is proposing to treat the funds in a hybrid system (*i.e.*, a system in which a “reserve account” is supplemented by subaccounts) as “deposits.”

An argument could be made that the funds in a hybrid system should not be treated as “deposits” because neither the pooled “reserve account” nor any of the individual subaccounts in a hybrid system is a conventional “commercial, checking, savings, time, or thrift account” as those terms are interpreted in GC8. Therefore, under the reasoning in GC8, it could be argued that the funds are not “deposits” under paragraph 3(l)(1) of the statutory definition. *See* 61 FR 40490. Moreover, the funds are used by the bank customers to engage in miscellaneous and unrelated transactions. Under the logic set forth in GC8, it could be argued that the funds are not “deposits” under paragraph 3(l)(3). *See* 61 FR 40490.

On the other hand, the FDIC in GC8 applied paragraph 3(l)(3) to pooled “reserve accounts” but never applied paragraph 3(l)(3) to individual accounts or subaccounts. In the case of a “Bank Primary-Customer Account System,” the FDIC did not apply paragraph 3(l)(3) to the individual accounts because the FDIC assumed that the individual accounts would be conventional “commercial, checking, savings, time, or thrift accounts” and therefore “deposits” under paragraph 3(l)(1). *See* 61 FR 40490. Even if the individual accounts

in a “Bank Primary-Customer Account System” or hybrid system are not conventional “commercial, checking, savings, time, or thrift accounts” as those terms are interpreted in GC8, an argument can be made that the funds in each of these accounts or subaccounts are “deposits” under paragraph 3(l)(3) because they are held by the insured depository institution for the “special or specific purpose” of satisfying the institution’s obligations to a specific customer, *i.e.*, the cardholder. In fact, the FDIC staff has endorsed this legal analysis in a published advisory opinion involving a stored value product. *See* FDIC Advisory Opinion No. 97–4 (May 12, 1997).

Moreover, in a hybrid system, the fact that the pooled self-described “reserve account” may not qualify as a “commercial, checking, savings, time, or thrift account” under paragraph 3(l)(1) does not mean that the individual subaccounts do not qualify as “commercial, checking, savings, time, or thrift accounts” under paragraph 3(l)(1).

In summary, the funds in a hybrid system qualify as “deposits” under paragraph 3(l)(3) and paragraph 3(l)(1). Accordingly, the FDIC is proposing to treat the funds in a hybrid system as “deposits.” Comments are requested.

#### *C. “Payroll Cards”*

Another new type of stored value card is the “payroll card.” In paying wages, some employers are distributing “payroll cards” to their employees in lieu of checks.

Prior to the distribution of the cards, the employer places funds at an insured depository institution. After the distribution of the cards, the employees may withdraw the funds by using their cards. Specifically, the employees may withdraw the funds at automated teller machines or transfer the funds to merchants through the merchants’ point of sale terminals.

The FDIC’s staff position with respect to “payroll cards” is set forth in FDIC Advisory Opinion No. 02–03 (August 16, 2002). In that opinion, the staff addressed the question of whether the funds placed at the insured depository institution by the employer are insurable on a “pass-through” to the employees. As explained in that opinion, the issue depends upon the actual ownership of the funds. If the funds belong to the employer (as in the case of a traditional corporate payroll account), the funds are insurable to the employer. In other words, in the event of the failure of the insured depository institution, the funds would be aggregated with the employer’s other funds (if any) at the same insured

depository institution and insured up to \$100,000. *See* 12 CFR 330.11(a) (providing that the deposit accounts of a corporation are added together and insured up to \$100,000). On the other hand, the funds would be insurable on a “pass-through” basis to the employees (assuming the satisfaction of the FDIC’s requirements for “pass-through” insurance coverage as previously explained) if ownership of the funds has passed to the employees (as in the case of direct deposits made by an employer on behalf of employees) prior to the failure of the insured depository institution.

The actual ownership of the funds would depend upon the agreement between the parties. One factor would be whether the employer retains a reversionary interest in the funds (*e.g.*, in the event of the expiration of a card). The retention of a reversionary interest would indicate that the funds actually belong to the employer and not the employees.

As explained above, the issue addressed in FDIC Advisory Opinion No. 02–03 was whether deposits underlying certain “payroll cards” were eligible for “pass-through” insurance coverage to the employees. In contrast, the issue addressed by this proposed rulemaking is whether certain funds qualify as “deposits.” The two issues are distinct. The former issue (whether coverage is limited to \$100,000 in aggregation with the employer’s other deposits) may be moot depending upon the resolution of the latter issue (whether the funds qualify as “deposits”).

In regard to the former issue as to the insurance coverage of deposits underlying “payroll cards,” this proposed rulemaking does not conflict with FDIC Advisory Opinion No. 02–03. In fact, the proposed rule includes no special provisions dealing with “payroll cards.” Likewise, the proposed rule includes no special provisions dealing with “prepaid cards” or “debit cards” or “check cards.” Rather, the proposed rule would apply equally to all types of stored value bank cards. Under the proposed rule, the funds underlying all such types of cards—including “payroll cards”—would be “deposits” except under the following circumstances: (1) The issuer of the cards (*i.e.*, the party that promises to make payments on the cards) is the insured depository institution (and not the employer or other sponsoring company); and (2) the depository institution maintains a pooled “reserve account” but maintains no subaccounts or other supplemental records reflecting the amount of money owed to particular cardholders.

In a case involving “payroll cards,” the FDIC would apply the proposed rule in determining whether the underlying funds qualify as “deposits.” If a determination is made that the funds are “deposits,” the FDIC then would apply the principles set forth in FDIC Advisory Opinion No. 02–03 in determining whether the deposits are entitled to “pass-through” insurance coverage.

Comments are requested as to whether the treatment outlined above is the appropriate treatment of funds underlying “payroll cards” and other types of stored value bank cards.

Whether funds underlying stored value bank cards are “deposits” has implications in a number of areas, including but not limited to those discussed below.

## V. Acquisitions and Mergers

Section 3(d) of the Bank Holding Company Act (“BHC Act”) and section 44(b) of the FDI Act allow the appropriate federal banking agency to approve an interstate bank acquisition or merger only if, among other things, the resulting organization and its affiliates, upon consummation, would not control more than 10 percent of the total amount of “deposits” of insured depository institutions in the United States. See 12 U.S.C. 1831u(b); 12 U.S.C. 1842(d). For purposes of this restriction, the term “deposit” is defined by reference to section 3(l) of the FDI Act. See 12 U.S.C. 1842(d)(2)(E). Comments are requested on whether this rulemaking could materially affect the operation of the deposit limit on interstate acquisitions or mergers under section 3(d) of the BHC Act or section 44(b) of the FDI Act.

## VI. The Definition of “Stored Value Card”

In GC8, the FDIC described a “stored value card” as follows: “A stored value card stores information electronically on a magnetic stripe or computer chip and can be used to purchase goods or services. The balance recorded on the card is debited at a merchant’s point of sale terminal when the consumer makes a purchase.” 61 FR 40490.

Some stored value card systems may be designed in such a manner that a balance is not recorded on the card itself through a magnetic stripe or computer chip. Rather, the system might be designed so that the cardholder or merchant must contact the bank to determine the cardholder’s balance. In any event, a stored value card is a device that enables the cardholder to transfer the underlying funds (*i.e.*, the funds received by the issuer of the card

in exchange for the issuance of the card) to a merchant at the merchant’s point of sale terminal.

As explained in GC8, stored value cards may be “loaded” in a variety of ways. If the cards are issued by a sponsoring company, a card will be “loaded” when the cardholder gives cash to the sponsoring company (directly or through the sponsoring company’s receiving agent) in exchange for the card. If the cards are issued by an insured depository institution, a card will be “loaded” when (1) The cardholder gives cash to the depository institution in exchange for the card; or (2) the cardholder directs the depository institution to draw funds from a pre-existing account in exchange for the card. Some cards are “reloadable”; others are not. See *id.*

A stored value card is not cash. Rather, a stored value card is a device that stores information electronically (*e.g.*, on a magnetic stripe or computer chip). A stored value card enables a consumer to transfer the underlying funds (*i.e.*, the funds received by the issuer of the card in exchange for the issuance of the card) to a merchant at the merchant’s point of sale terminal. When used by a consumer, a stored value card (or the information on the card) moves through a “clearing” process. In GC8, the FDIC explained this point as follows: “Although it may not be apparent to the consumer, a stored value card transaction must typically move through a complex payment system before a payment is completed. Moreover, what is actually stored on stored value cards is information that, through the use of programmed terminals, advises a prospective payee that rights to a sum of money can be transferred to the payee, who in turn can exercise such right and be paid.” 61 FR 40490.

Different types of stored value cards function in different ways. For example, a stored value card transaction may be “on-line” in that the card may provide direct access to a database for the purpose of obtaining payment authorization. On the other hand, the transaction may be “off-line” in that the card may not provide direct access to a database. Rather, information concerning the transaction may be captured at the merchant’s point of sale terminal and then transmitted—after some delay—to a data facility. See 61 FR 19696 (May 2, 1996). In either case, “clearing” will occur when payment is made to the merchant by the insured depository institution.

For purposes of this proposed rulemaking, the distinction between “on-line” transactions and “off-line”

transactions is unimportant. The distinction that matters to the FDIC is whether the stored value card provides access (directly or indirectly) to money received and held by an insured depository institution. Assuming that money is held by an insured bank, the proposed rule would govern the question of whether the money qualifies as “deposits.” In the absence of any such money, however, the existence of “deposits” is impossible. See *FDIC v. Philadelphia Gear Corporation*, 106 S. Ct. 1931 (1986). Thus, the proposed rule would not apply to a “closed” stored value card system (such as a “gift card” system sponsored by a retailer) in which the merchant receives prepayment from the cardholder and does not receive payment through a bank. See footnote 1, *supra*.<sup>3</sup>

The description of a “stored value card” in GC8 has been used in defining “stored value card” in the proposed rule. Comments are requested on the proposed definition.

## VII. Insurance Coverage

The proposed regulation does not set forth any special rules regarding the insurance coverage of any “deposits” underlying stored value cards. Rather, the proposed regulation merely states that the insurance coverage of any such “deposits” shall be governed by the FDIC’s insurance regulations at 12 CFR part 330.

Under the FDI Act and the insurance regulations, the FDIC must aggregate all “deposits” owned by a particular depositor in a particular ownership capacity in applying the \$100,000 insurance limit. See 12 U.S.C. 1821(a)(1)(C); 12 CFR 330.3(a). In identifying the owners of “deposits” for insurance purposes, the FDIC is entitled to rely upon the account records of the failed insured depository institution. See 12 U.S.C. 1822(c); 12 CFR 330.5. The application of these basic principles may be difficult in the case of “deposits” underlying certain stored value cards. For example, an insured depository institution might offer a type of stored value card that can be transferred from the original purchaser to some other person. Assuming the existence of such transferable cards, the depository institution might keep records as to the identities of the original purchasers but no records as to the ultimate cardholders. In the absence of such

<sup>3</sup> In a “closed” system sponsored by a retailer, the possibility may exist that data-processing is provided by an insured depository institution. This circumstance would not affect the conclusion above that the funds are not “deposits” provided that the funds are not received or held by the insured depository institution.

records, the FDIC may be unable to identify the ultimate cardholder in the event of the failure of the institution. In light of such possibilities, comments are requested as to whether the FDIC should adopt any special rules governing the insurance coverage of any “deposits” underlying stored value cards or other stored value products.

Of course, insurance coverage will not be an issue if the funds do not qualify as “deposits” under the proposed rule. As previously explained, the funds will not be “deposits” if (1) the issuer of the cards is the insured depository institution (and not a sponsoring company); and (2) the depository institution maintains a pooled “reserve account” but maintains no subaccounts or supplemental records reflecting the amount of money owed to particular cardholders (*i.e.*, the institution maintains no supplemental records reflecting the amount of money owed to the original cardholder or any subsequent cardholder in the case of a transferable card).

#### VIII. Required Disclosures

In a press release dated June 24, 1997 (PR-44-97), subsequent to the issuance of GC8, the FDIC stated that it “expects insured depository institutions to clearly and conspicuously disclose to customers the insured or non-insured status of the stored-value cards they offer to the public.”

The FDIC continues to be concerned that some purchasers of stored value cards may not understand whether the funds given to an insured depository institution in exchange for such cards are covered by federal deposit insurance. In order to avoid confusion on the part of customers, depository institutions must accurately disclose the insurability of the funds underlying any stored value product in a manner that is clear and conspicuous. For example, in cases in which the funds qualify as “deposits,” the cards might include the following statement: “Member FDIC—Funds accessible by this card are insured by the Federal Deposit Insurance Corporation.” On the other hand, in cases in which the funds do not qualify as “deposits,” the cards might include this statement: “NOT FDIC INSURED—Funds accessible by this card are NOT insured by the Federal Deposit Insurance Corporation.” In addition, any advertisements for the stored value product (including written materials provided by the depository institution when a card is delivered to a consumer) must state whether the underlying funds are insured by the FDIC. Also, any advertisements for insured “deposit” products must

comply with the membership advertisement requirements of 12 CFR 328.3.

In the case of cards issued by sponsoring companies (and not issued by an insured depository institution), the company should not suggest that the customer will be protected by the FDIC. Even if the sponsoring company maintains an account at an FDIC-insured depository institution for the purpose of making payments on its cards, the company should make no representations about FDIC insurance to the customer because the insured depository will be the company and not the customer (unless the FDIC’s requirements for “pass-through” insurance coverage have been satisfied as previously explained). False representations about FDIC insurance could be subject to criminal penalties. *See* 18 U.S.C. 709.

Although the proposed regulation does not set forth any new specific disclosure requirements, the FDIC seeks comments on this subject. Specifically, the FDIC requests comments as to whether the proposed rule ought to mandate the disclosures detailed above (or similar disclosures).

#### *Request for Comments*

The FDIC is seeking comments on whether the agency should adopt a regulation to clarify the meaning of the term “deposit” as that term relates to funds at insured depository institutions underlying stored value cards. Under the proposed regulation, the funds would be “deposits” unless (1) the institution itself has issued the cards against a pooled “reserve account” representing multiple cardholders; and (2) the institution maintains no supplemental records or subaccounts reflecting the amount owed to each cardholder.

Comments are requested on the proposed rule. Commenters may wish to address each of the following specific questions:

1. Should the FDIC promulgate a new section to part 303 to clarify the meaning of “deposit” as that term relates to funds at insured depository institutions underlying stored value cards?
2. If so, should the FDIC adopt the proposed rule? Why?
3. In the alternative, should the FDIC adopt some other rule? Under what circumstances should funds received by an insured depository institution not be insurable as “deposits”?
4. What should be the treatment of funds underlying “payroll cards”?
5. Will the proposed rule affect the operation of the deposit limitations in

section 3(d) of the Bank Holding Company Act or section 44(b) of the FDI Act?

6. Should the FDIC adopt the proposed definition of “stored value card”? Can this definition be improved? What are the differences (if any) between “stored value cards” and other types of bank cards such as “prepaid cards,” “debit cards,” “check cards” and “payroll cards”?

7. Should the FDIC adopt specific disclosure requirements? If so, do the disclosures provided as examples in the preamble adequately address consumer confusion about the insurability of funds underlying stored value products? Are there ways to reduce the costs or burdens associated with providing disclosures about the insurability of such funds?

8. Should the FDIC adopt any special rules governing the insurance coverage of any “deposits” underlying stored value cards?

9. Are insured depository institutions offering stored value products or systems that are not addressed in this notice of proposed rulemaking? Please explain.

10. In the case of a stored value card system in which the cards are issued by an insured depository institution, and the depository institution maintains a pooled “reserve account” reflecting its liabilities for all cards but does not maintain individual accounts or subaccounts reflecting its liabilities to individual cardholders, how does the institution keep track of its liabilities? What technology is used? How does the institution know when and whether to make payments to merchants?

#### *Paperwork Reduction Act*

The FDIC believes that insured depository institutions—in issuing stored value cards—must make clear and accurate disclosures as to whether the underlying funds are insured. The subject of disclosures is discussed in Section VIII.

Requiring the disclosure of information to the public may qualify as a “collection of information” for purposes of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). *See* 5 CFR 1320.3(c). In this case, however, the required disclosure is not a “collection of information” because the FDIC (in Section VIII) is providing specific language that insured depository institutions may use in disclosing information to the public. *See* 5 CFR 1320.3(c)(2). Moreover, insured depository institutions must ascertain the information in question—whether funds underlying stored value cards qualify as “deposits”—in completing

their Call Reports. Thus, nothing in this notice of proposed rulemaking requires an insured depository institution to collect information that the institution otherwise would not collect.

In summary, no collections of information pursuant to the Paperwork Reduction Act are contained in the proposed rule. Consequently, no information has been submitted to the Office of Management and Budget for review.

#### *Regulatory Flexibility Act*

##### *Request for Comments*

In accordance with section 3(a) of the Regulatory Flexibility Act (5 U.S.C. 603(a)), the FDIC must publish an initial regulatory flexibility analysis with this proposed rulemaking or certify that the proposed rule, if adopted, will not have a significant economic impact on a substantial number of small entities. For purposes of the required analysis or certification, depository institutions with total assets of \$150 million or less are considered to be "small entities."

For the reasons set forth below, the FDIC hereby certifies pursuant to 5 U.S.C. 605(b) that the proposed rule, if adopted, will not have a significant economic impact on a substantial number of small entities.

#### *Economic Impact*

This proposed rulemaking is not intended to apply to any issue except the meaning of "deposit" under the FDI Act. Though this rulemaking may affect the manner in which some insured depository institutions report "deposits" in their Call Reports, the rulemaking generally will not impose new obligations on insured depository institutions because such institutions—irrespective of this rulemaking—must file Call Reports.

Notwithstanding the above, the FDIC may be imposing new obligations on insured depository institutions in directing such institutions—when issuing stored value cards—to make clear and conspicuous disclosures as to whether the underlying funds are insured. The subject of disclosures is discussed in Section VIII. The FDIC believes that clear, conspicuous disclosures are necessary in order to prevent confusion on the part of the public. See 12 U.S.C. 1819 (investing the FDIC with general rulemaking authority with respect to deposit insurance). In any event, the FDIC believes that the cost of adding clear and conspicuous disclosures to stored value cards will not result in a significant economic impact on a substantial number of small entities.

This conclusion is based upon the fact that the cost will involve the design of a depository institution's stored value cards, not the production of such cards. Adding a one-sentence disclosure to a card should involve at most only a minimal cost. Indeed, the addition of a clear and conspicuous disclosure about insurance coverage may reduce the institution's costs in answering questions from the public about FDIC insurance coverage.

Although this proposed rulemaking should not create a significant adverse economic impact on an insured depository institution, and may even result in a modest net benefit, the FDIC believes that insured depository institutions should be given an opportunity to provide comments on the subject. Accordingly, comments are requested (*see below*).

The FDIC is not aware of any Federal rules that would duplicate, overlap or conflict with a requirement that stored value cards issued by insured depository institutions must include clear and conspicuous disclosures about insurance coverage.

#### *Request for Comments*

The FDIC requests comments as to the cost of adding a clear and conspicuous disclosure about insurance coverage to stored value cards issued by insured depository institutions. Commenters may wish to address the following: (1) The number of small entities that are issuing stored value cards or may issue stored value cards; (2) the manner and impact of adding a clear and conspicuous disclosure about insurance coverage to stored value cards; and (3) alternative methods of preventing confusion on the part of the public.

#### *Impact on Families*

The proposed rule would not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105-277, 112 Stat. 2681).

#### **List of Subjects in 12 CFR Part 303**

Administrative practice and procedures, Authority delegations (Government agencies), Banks, Banking, Bank merger, Branching, Foreign investments, Golden parachute payments, Insured branches, Interstate branching, Reporting and recordkeeping requirements, Savings associations.

For the reasons set forth in the preamble, the Board of Directors of the Federal Deposit Insurance Corporation proposes to amend part 303 of Title 12

of the Code of Federal Regulations as follows:

#### **PART 303—FILING PROCEDURES**

1. The authority citation for part 303 continues to read as follows:

**Authority:** 12 U.S.C. 378, 1813, 1815, 1816, 1817, 1818, 1819 (Seventh and Tenth), 1820, 1823, 1828, 1831a, 1831e, 1831o, 1831p-1, 1835a, 3104, 3105, 3108, 3207; 15 U.S.C. 1601-1607.

2. New § 303.16 is added to read as follows:

#### **§ 303.16 The definition of "deposit" as that term relates to funds underlying stored value cards**

(a) *Purpose.* The term "deposit" is defined in section 3(l) of the Federal Deposit Insurance Act (12 U.S.C. 1813(l)). The purpose of this section is to clarify the meaning of "deposit" as that term relates to funds at insured depository institutions underlying stored value cards.

(b) *Funds received from cardholders, or funds received from others on behalf of cardholders or for payment to cardholders, in exchange for stored value cards issued by the insured depository institution.* In the case of funds received by an insured depository institution from cardholders, or funds received from others on behalf of cardholders or for payment to cardholders, in exchange for stored value cards issued by the depository institution, the funds are "deposits" unless:

(1) The depository institution records its liabilities for such funds in an account representing multiple cardholders; and

(2) The depository institution (directly or through an agent) maintains no supplemental records or subaccounts reflecting the amount owed to each cardholder. Nothing in this subparagraph (b)(2) is intended to suggest that an insured depository institution may ignore any law or regulation that may otherwise require the depository institution to maintain records reflecting the amount owed to each cardholder.

(c) *Funds received from cardholders in exchange for stored value cards issued by a sponsoring company.* In the case of funds received by an insured depository institution from cardholders in exchange for stored value cards issued by a company ("sponsoring company") and not issued by the insured depository institution (*i.e.*, the insured depository institution serves as an agent of the sponsoring company in collecting funds and distributing cards), the funds shall be classified as follows:

(1) The funds are "deposits" if the depository institution bears an obligation to forward the funds to the sponsoring company or to hold the funds for the sponsoring company. After the forwarding of such funds to the sponsoring company, or the withdrawal of such funds by the sponsoring company from the depository institution, the funds shall cease to be "deposits" at the depository institution.

(2) The funds are not "deposits" if the depository institution bears no obligation to forward or hold the funds (e.g., the depository institution purchases the cards from the sponsoring company and then resells the cards to the cardholders).

(d) *Funds placed by sponsoring companies.* In the case of funds placed at an insured depository institution by a sponsoring company for the purpose of making payments on stored value cards issued by that company, the funds are "deposits."

(e) *Insurance coverage.* In the case of any funds that qualify as "deposits" under this section, the insurance coverage of such funds shall be governed by the rules set forth in part 330 of this chapter.

(f) *Definition of "stored value card."* For the purposes of this section, the term "stored value card" means a device that enables the cardholder to transfer the underlying funds (i.e., the funds received by the issuer of the card in exchange for the issuance or reloading of the card) to a merchant at the merchant's point of sale terminal.

Dated at Washington, DC, this 6th day of April, 2004.

Authorized to be published in the **Federal Register** by Order of the Board of Directors of the Federal Deposit Insurance Corporation.

**Robert E. Feldman,**

*Executive Secretary.*

[FR Doc. 04-8613 Filed 4-15-04; 8:45 am]

BILLING CODE 6714-01-P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. 2003-CE-58-AD]

RIN 2120-AA64

#### Airworthiness Directives; Stemme GmbH & Co. Models S10, S10-V, and S10-VT Sailplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The FAA proposes to adopt a new airworthiness directive (AD) for all Stemme GmbH & Co. Models S10, S10-V, and S10-VT sailplanes. This proposed AD would require you to remove the drive shaft assembly and ship it to the service department of Stemme GmbH & Co. The engine is mounted behind the two side-by-side seats. The engine combined with the carbon fiber drive shaft turn the centrifugally extended propeller. After an initial visual inspection, the service department will perform an operational check to determine whether the drive shaft can be further used or must be replaced. Once corrective action is identified, a drive shaft will be shipped to you for installation. This proposed AD is the result of mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for Germany. We are issuing this proposed AD to detect and correct incorrectly glued drive shafts, which could result in drive shaft failure. During self-takeoff or critical periods of landing, failure of the drive shaft could lead to loss of control of the sailplane.

**DATES:** We must receive any comments on this proposed AD by May 26, 2004.

**ADDRESSES:** Use one of the following to submit comments on this proposed AD:

- *By mail:* FAA, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 2003-CE-58-AD, 901 Locust, Room 506, Kansas City, Missouri 64106.
- *By fax:* (816) 329-3771.
- *By e-mail:* 9-ACE-7-Docket@faa.gov. Comments sent electronically must contain "Docket No. 2003-CE-58-AD" in the subject line. If you send comments electronically as attached electronic files, the files must be formatted in Microsoft Word 97 for Windows or ASCII.

You may get the service information identified in this proposed AD from Stemme GmbH & Co. AG, Flugplatzstraße F 2, Nr. 7, D-15344 Strausberg, Germany.

You may view the AD docket at FAA, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 2003-CE-58-AD, 901 Locust, Room 506, Kansas City, Missouri 64106. Office hours are 8 a.m. to 4 p.m., Monday through Friday, except Federal holidays.

#### FOR FURTHER INFORMATION CONTACT:

Gregory Davison, Aerospace Engineer, Small Airplane Directorate, ACE-112, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329-4130; facsimile: (816) 329-4090.

#### SUPPLEMENTARY INFORMATION:

#### Comments Invited

*How do I comment on this proposed AD?* We invite you to submit any written relevant data, views, or arguments regarding this proposal. Send your comments to an address listed under **ADDRESSES**. Include "AD Docket No. 2003-CE-58-AD" in the subject line of your comments. If you want us to acknowledge receipt of your mailed comments, send us a self-addressed, stamped postcard with the docket number written on it. We will date-stamp your postcard and mail it back to you.

*Are there any specific portions of this proposed AD I should pay attention to?* We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. If you contact us through a nonwritten communication and that contact relates to a substantive part of this proposed AD, we will summarize the contact and place the summary in the docket. We will consider all comments received by the closing date and may amend this proposed AD in light of those comments and contacts.

#### Discussion

*What events have caused this proposed AD?* The Luftfahrt-Bundesamt (LBA), which is the airworthiness authority for Germany, recently notified FAA that an unsafe condition may exist on all Stemme GmbH & Co. Models S10, S10-V, and S10-VT sailplanes. The LBA reports that two drive shafts have failed during normal operation of the sailplane. The flanges of the drive shafts started to rotate within the carbon fibre reinforced plastics-tube (CFRP-tube), while the drive shafts still appeared to be intact when looking at them from the outside. The metal flanges on both ends of the drive shafts might not have been properly glued to the CFRP-tube.

*What are the consequences if the condition is not corrected?* Incorrectly glued drive shafts could result in drive shaft failure. This failure could lead to loss of control of the sailplane.

*Is there service information that applies to this subject?* Stemme GmbH & Co. has issued Service Bulletin No. A31-10-058, dated November 8, 2001.

*What are the provisions of this service information?* The service bulletin includes procedures for the inspection of the drive shaft.

*What action did the LBA take?* The LBA classified this service bulletin as mandatory and issued German AD Number 2002-113, dated May 2, 2002, to ensure the continued airworthiness of these sailplanes in Germany.

*Did the LBA inform the United States under the bilateral airworthiness agreement?* These Stemme GmbH & Co. Models S10, S10-V, and S10-VT sailplanes are manufactured in Germany and are type-certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement.

Under this bilateral airworthiness agreement, the LBA has kept us informed of the situation described above.

#### FAA's Determination and Requirements of This Proposed AD

*What has FAA decided?* We have examined the LBA's findings, reviewed all available information, and determined that AD action is necessary for products of this type design that are

certificated for operation in the United States.

Since the unsafe condition described previously is likely to exist or develop on other Stemme GmbH & Co. Models S10, S10-V, and S10-VT sailplanes of the same type design that are registered in the United States, we are proposing AD action to detect and correct incorrectly glued drive shafts that could result in drive shaft failure. This failure could lead to loss of control of the sailplane.

*What would this proposed AD require?* This proposed AD would require you to incorporate the actions in the previously-referenced service bulletin.

*How does the revision to 14 CFR part 39 affect this proposed AD?* On July 10, 2002, we published a new version of 14 CFR part 39 (67 FR 47997, July 22, 2002), which governs FAA's AD system.

This regulation now includes material that relates to altered products, special flight permits, and alternative methods of compliance. This material previously was included in each individual AD. Since this material is included in 14 CFR part 39, we will not include it in future AD actions.

#### Costs of Compliance

*How many sailplanes would this proposed AD impact?* We estimate that this proposed AD affects 57 sailplanes in the U.S. registry.

*What would be the cost impact of this proposed AD on owners/operators of the affected sailplanes?* We estimate the following costs to remove the drive shaft, ship it to and from manufacturer's service department, and install the drive shaft after manufacturer's inspection is complete:

| Labor cost                                   | Parts cost | Shipping cost to and from manufacturer | Total cost per sailplane | Total cost on U.S. operators |
|--|------------|--|--------------------------|------------------------------|
| 6 workhours est. \$65 per hour = \$390 ..... | N/A        | \$1,080                                | \$1,470                  | \$83,790                     |

We estimate the following costs for the manufacturer to do the proposed inspection and any necessary repairs

that would be required based on the results of this proposed inspection. We

have no way of determining the number of sailplanes that may need this repair:

| Labor cost   | Parts cost | Total cost per sailplane |
|--|------------|--------------------------|
| Inspection and testing by manufacturer—\$210 .....                   | N/A        | \$210                    |
| Replacement of drive shaft—labor is included in the parts cost ..... | \$5,780    | \$5780                   |

#### Regulatory Findings

*Would this proposed AD impact various entities?* We have determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

*Would this proposed AD involve a significant rule or regulatory action?* For the reasons discussed above, I certify that this proposed AD:

1. Is not a "significant regulatory action" under Executive Order 12866;
2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and
3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities

under the criteria of the Regulatory Flexibility Act.

We prepared a summary of the costs to comply with this proposed AD and placed it in the AD Docket. You may get a copy of this summary by sending a request to us at the address listed under **ADDRESSES**. Include "AD Docket No. 2003-CE-58-AD" in your request.

#### List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

#### The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend 14 CFR part 39 as follows:

#### PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40113, 44701.

#### § 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

**Stemme GmbH & Co.:** Docket No. 2003-CE-58-AD

#### When Is the Last Date I Can Submit Comments on This Proposed AD?

(a) We must receive comments on this proposed airworthiness directive (AD) by May 26, 2004.

#### What Other ADs Are Affected by This Action?

(b) None.

#### What Sailplanes Are Affected by This AD?

(c) This AD affects the following sailplane models and serial numbers that are certificated in any category:

| Models           | Serial numbers   |
|------------------|--|
| (1) S10-VT ..... | 11-001 through 11-055, 11-057, 11-058, and 11-060 through 11-066;  |
| (2) S10-V .....  | 14-003, 14-004, 14-007, 14-014, 14-015, and 14-018 through 14-030, as well as conversion serial numbers 14-028M, 14-036M, and 14-038M; and |
| (3) S10 .....    | 10-08 and 10-13.   |

#### What Is the Unsafe Condition Presented in This AD?

(d) The actions specified in this AD are intended to identify incorrectly glued drive

shafts, which could result in drive shaft failure. This failure could lead to loss of control of the sailplane.

#### What Must I Do To Address This Problem?

(e) To address this problem, you must do the following:

| Action   | Compliance   | Procedures  |
|--|--|---|
| (1) Remove the drive shaft and ship it to the service department of Stemme GmbH & Co. for inspection at the following address: Stemme GmbH & Co. AG, Flugplatzstraße F 2, Nr. 7, D-15344 Strausberg, Germany. The sailplane's Component History Card and information about the current operating times (time since new, time since overhaul) must be included. | Do within 50 hours time in service from the effective date of this AD. | Follow the procedures in the Stemme GmbH & Co. Service Bulletin A31-10-058, dated November 8, 2001. |
| (2) Install the drive shaft after Stemme GmbH & Co. has performed the inspections, determined corrective action, and returned the drive shaft.   | Prior to further flight after receiving the returned drive shaft.      | Follow the procedures in the Stemme GmbH & Co. Service Bulletin A31-10-058, dated November 8, 2001. |

#### May I Request an Alternative Method of Compliance?

(f) You may request a different method of compliance or a different compliance time for this AD by following the procedures in 14 CFR 39.13. The principal inspector may add comments and will send your request to the Manager, Flight Standards, FAA. For information on any already approved alternative methods of compliance, contact Gregory M. Davison, Aerospace Engineer, Small Airplane Directorate, ACE-112, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329-4130; facsimile: (816) 329-4090.

#### May I Get Copies of the Documents Referenced in this AD?

(g) You may get copies of the documents referenced in this AD from Stemme GmbH & Co., Flugplatzstraße F 2, Nr. 7, D-15344 Strausberg, Germany. You may view these documents at FAA, Central Region, Office of the Regional Counsel, 901 Locust, Room 506, Kansas City, Missouri 64106.

#### Is There Other Information That Relates to This Subject?

(h) LBA Airworthiness Directive No. 2002-113, dated May 2, 2002, and Stemme GmbH & Co. Service Bulletin A31-10-058, dated November 8, 2001, also address the subject of this AD.

Issued in Kansas City, Missouri, on April 8, 2004.

**William J. Timberlake,**

*Acting Manager, Small Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 04-8586 Filed 4-15-04; 8:45 am]

**BILLING CODE 4910-13-P**

#### DEPARTMENT OF HOMELAND SECURITY

##### Coast Guard

##### 33 CFR Part 110

[CGD01-04-004]

1625-AA01

##### Anchorage Grounds; Buzzards Bay, MA

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Coast Guard proposes to amend the anchorage regulations for Buzzards Bay, Nantucket Sound, and adjacent waters of Massachusetts by relocating anchorage ground "L" in Buzzards Bay to an area near Naushon Island, MA. This action is intended to increase the safety of life and property on Buzzards Bay, improve the safety of anchored vessels in anchorage "L", and provide for the overall safe and efficient flow of vessel traffic and commerce via the proposed Recommended Traffic Route for Deep Draft Vessels. The proposed regulation would maintain the shape and dimension of anchorage "L" but move the anchorage within Buzzards Bay.

**DATES:** Comments and related material must reach the Coast Guard on or before July 15, 2004.

**ADDRESSES:** Comments should be mailed to: Commander (oan) (CGD01-04-004), First Coast Guard District, 408 Atlantic Ave., Boston, Massachusetts

02110, or deliver them to room 628 at the same address between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The Office of Aids to Navigation Branch, First Coast Guard District maintains the public docket for this rulemaking. Comments, and documents as indicated in this preamble, will become part of this docket and will be available for inspection or copying at room 628, First Coast Guard District Boston, between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Mr. J. J. Mauro, Commander (oan), First Coast Guard District, 408 Atlantic Ave., Boston, MA 02110, at (617) 223-8355.

#### SUPPLEMENTARY INFORMATION:

##### Request for Comments

The Coast Guard encourages interested persons to participate in this rulemaking by submitting comments and related material. Persons submitting comments should include their names and addresses, identify the docket number for this rulemaking (CGD01-04-004), indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. Persons wanting acknowledgment of receipt of comments should enclose stamped, self-addressed postcards or envelopes. We will consider all comments and material received during the comment period.

We may change this proposed rule in view of the comments received.

### Public Meeting

The Coast Guard plans no public hearing. Persons may request a public hearing by writing to the Office of Aids to Navigation Branch at the Address under **ADDRESSES**. The request should include the reasons why a hearing would be beneficial. If we determine that the opportunity for oral presentations will aid this rulemaking, we will hold a public hearing at a time and place announced by a later notice in the **Federal Register**.

### Background and Purpose

In light of significant oil spills in Rhode Island Sound in 1996 and Buzzards Bay in 2003, specific recommendations from a navigation risk assessment conducted by a formal Ports and Waterways Safety Assessment (PAWSA) for Buzzards Bay in North Falmouth, Massachusetts, on 9–10 September 2003, and a letter to the Coast Guard First District Commander signed by members of the Massachusetts Congressional delegation, it appears that measures should be taken to enhance the safety of navigation within Buzzards Bay. A Recommended Traffic Route for vessels may be needed to improve navigation safety in this area. The Recommended Route, to be implemented on April 27, 2004, was presented to the Southeastern Massachusetts and Rhode Island Port Safety and Security Committees, the stakeholder participants at the Buzzards Bay Ports and Waterways Safety Assessment (PAWSA), and to many commercial tug and vessel masters, with no objections. Additionally, the route has been presented to the American Waterways Operators (AWO) organization for its review. AWO generally supports the establishment of recommended traffic routes, provided that vessel masters are afforded latitude to deviate from the routes as circumstances, such as weather or vessel traffic, might dictate. As contemplated, vessel masters would indeed have such latitude. A Buzzards Bay Traffic Route would not preclude vessel masters from using their best judgment navigating their vessels to ensure safety.

Presently, there are two designated anchorage grounds in Buzzards Bay; anchorage “L” and anchorage “M”, located at 33 CFR 110.140(b)(3) and 33 CFR 110.140(b)(4), respectively. The present location of anchorage “L” puts it directly in the proposed path of the Recommended Route for Deep Draft vessels entering or leaving the Cape Cod

Canal via Cleveland Ledge Channel. The proposed size and shape of the new anchorage ground, similarly called anchorage “L”, would remain the same.

In developing this proposed rule, the Coast Guard has consulted with and has the approval of the Chief of Engineers the Army Corps of Engineers, Northeast. This proposed rule would not exclude fishing activity or the transit of vessels in the anchorage grounds. The Coast Guard anticipates the proposed new location of anchorage ground “L” would cause minimal transit interference with the new route.

### Discussion of Proposed Rule

The proposed rule would move Anchorage “L” from one area of Buzzard’s Bay to another. The anchorage is currently in the center of Buzzards Bay and would move approximately 4 nm to the southwest part of the Bay. This proposal would enhance safety of navigation and efficiency for deep draft vessels transiting Buzzards Bay.

### Regulatory Evaluation

This proposed regulation is not a “significant regulatory action” under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not significant under the regulatory policies and procedures of the Department of Transportation (DOT) (44 FR 11040; February 26, 1979).

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation under paragraph 10(e) of the regulatory policies and procedures of DOT is unnecessary.

This conclusion is based upon the fact that there are no fees, permits, or specialized requirements for the maritime industry to utilize this anchorage area. The regulation is solely for the purpose of advancing the safety of maritime commerce.

### Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), the Coast Guard considered whether this proposed rule would have a significant economic impact on a substantial number of small entities. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule will not have a significant economic impact on a substantial number of small entities. This proposed rule would have minimal economic impact on lobster fishing vessels and recreational boaters. This conclusion is based upon the fact that there are no restrictions for entry or use of the proposed anchorage targeting small entities. The proposed regulation relocates one existing anchorage area.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

### Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact John J. Mauro at the address listed in **ADDRESSES** above.

### Collection of Information

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

### Federalism

The Coast Guard has analyzed this proposed rule under Executive Order 13132, Federalism, and has determined that this rule does not have implications for federalism under that Order.

### Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

### Taking of Private Property

This proposed rule would not effect a taking of private property or otherwise

have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

The Coast Guard has analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

Indian Tribal Governments

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

To help the Coast Guard establish regular and meaningful consultation and collaboration with Indian and Alaskan Native tribes, we published a notice in the **Federal Register** (66 FR 36361, July 11, 2001) requesting comments on how to best carry out the Order. We invite your comments on how this proposed rule might impact tribal governments, even if that impact may not constitute a “tribal implication” under the Order.

Energy Effects

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a “significant energy action” under that Order because it is not a “significant regulatory action” under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. It has not been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Environment

The Coast Guard has considered the environmental impact of this proposed rule and concluded that, under figure 2–1, paragraph (34)(f) of Commandant Instruction M16475.1D, this proposed rule is categorically excluded from further environmental documentation. A “Categorical Exclusion Determination” is available in the docket where indicated under **ADDRESSES**.

This rule proposes relocating one existing anchorage area to the East of the Recommend Route. This designated anchorage would enhance the safety in the waters of Buzzards Bay, MA by relieving vessel congestion within the bay. Thus, relocating this designated anchorage would provide a safer approach to the Cape Cod Canal by deep draft vessels.

List of Subjects in 33 CFR Part 110

Anchorage grounds.  
For the reasons set forth in the preamble, the Coast Guard proposes to amend 33 CFR part 110 as follows:

PART 110—ANCHORAGE REGULATIONS

1. The authority citation for part 110 continues to read as follows:

**Authority:** 33 U.S.C. 471, 1221 through 1236, 2030, 2035, 2071; 33 CFR 1.05–1(g) and Department of Homeland Security Delegation No. 0170.1.

2. In §110.140 paragraph (b)(3) is revised to read as follows:

§ 110.140 Buzzards Bay, Nantucket Sound, and adjacent waters, Mass.

\* \* \* \* \*  
(b) \* \* \*

(3) *Anchorage L-*. The waters bounded by a rhumb line connecting the following points:

| Latitude      | Longitude                          |
|---------------|------------------------------------|
| 41°030'011" N | 070°048'010" W; thence to          |
| 41°030'046" N | 070°048'045" W; thence to          |
| 41°032'024" N | 070°045'050" W; thence to          |
| 41°031'048" N | 070°045'015" W; returning to start |

\* \* \* \* \*

Dated: March 9, 2004.  
**Vivien S. Crea,**  
*RADM, U.S. Coast Guard, Commander, First Coast Guard District.*  
[FR Doc. 04–8498 Filed 4–15–04; 8:45 am]  
**BILLING CODE 4910–15–P**

DEPARTMENT OF DEFENSE

Corps of Engineers, Department of the Army

33 CFR Part 334

RIN 0710–AA56

United States Coast Guard Restricted Area, Coast Guard Base Mobile, Mobile, Alabama

**AGENCY:** U.S. Army Corps of Engineers, DoD.

**ACTION:** Notice of proposed rulemaking and request for comments.

**SUMMARY:** The U.S. Army Corps of Engineers is proposing to establish a new restricted area in the waters of Arlington Channel surrounding the U.S. Coast Guard Base Mobile Docks at Mobile, Alabama. The designation would ensure public safety and satisfy the Coast Guard’s security, safety, and operational requirements as they pertain to vessels at Coast Guard Base Mobile by establishing an area into which unauthorized vessels and persons may not enter.

**DATES:** Comments must be submitted on or before May 17, 2004.

**FOR FURTHER INFORMATION CONTACT:** Mr. Frank Torbett, Headquarters Regulatory Branch at (202) 761–1075 or Mr. John B. McFadyen, Corps Mobile District, at (251) 690–3261.

**SUPPLEMENTARY INFORMATION:** Pursuant to its authorities in section 7 of the Rivers and Harbors Act of 1917 (40 Stat. 266; 33 U.S.C. 1) and Chapter XIX of the Army Appropriation Act of 1919 (40 Stat. 892; 33 U.S.C. 3) the Corps proposes to amend the regulations in 33 CFR part 334 by establishing a new restricted area at 334.783 in the waters of Arlington Channel surrounding U.S. Coast Guard Base Mobile at Mobile, Alabama. The points defining the proposed restricted area were selected to minimize interference with other users of Arlington Channel, and to minimize the restricted area’s interference with commercial and recreational fisheries.

Procedural Requirements

a. Review Under Executive Order 12866

This proposed rule is issued with respect to a military function of the Homeland Security Department and the provisions of Executive Order 12866 do not apply.

b. Review under the Regulatory Flexibility Act

This proposed rule has been reviewed under the Regulatory Flexibility Act

(Pub. L. 96–354), which requires the preparation of a regulatory flexibility analysis for any regulation that will have a significant economic impact on a substantial number of small entities (*i.e.*, small businesses and small governments). The Corps expects that the economic impact of the establishment of this restricted area would have no impact on the public, no anticipated navigational hazard or interference with existing waterway traffic, and accordingly, certifies that this proposal, if adopted, will have no significant economic impact on small entities.

#### *c. Review Under the National Environmental Policy Act*

The Mobile District has prepared a preliminary Environmental Assessment (EA) for this action. The preliminary EA concluded that this action will not have a significant impact on the human environment. After receipt and analysis of comments from this **Federal Register** posting and the Mobile District's concurrent Public Notice, the Corps will prepare a final environmental document detailing the scale of impacts this action will have upon the human environment. The EA will be available for review at the Mobile District Office, Regulatory Branch, 109 St. Joseph St., Mobile, Alabama.

#### *d. Unfunded Mandates Act*

This proposed rule does not impose an enforceable duty among the private sector and, therefore, is not a Federal private sector mandate and is not subject to the requirements of section 202 or 205 of the Unfunded mandates Act. We have also found under section 203 of the Act that small governments will not be significantly and uniquely affected by this rulemaking.

#### **List of Subjects in 33 CFR Part 334**

Danger zones, Marine safety, Navigation (water), Restricted areas, Waterways.

For the reasons set out in the preamble, we propose to amend 33 CFR part 334 to read as follows:

#### **PART 334—DANGER ZONE AND RESTRICTED AREA REGULATIONS**

1. The authority citation for part 334 continues to read as follows:

**Authority:** 40 Stat. 266; (33 U.S.C. 1) and 40 Stat. 892; (33 U.S.C. 3).

2. Section 334.783 is added to read as follows:

#### **§ 334.783 Arlington Channel, U.S. Coast Guard Base, Mobile, Alabama, restricted area.**

(a) *The area.* The waters of Arlington Channel west of a line from latitude 30°–39′–09″ N, longitude 088°–03′–24″ W to latitude 30°–38′–54″ N., longitude 088°–03′–17″ W.

(b) *The regulation.* The restricted area is open to U.S. Government vessels and transiting vessels only. U.S. Government vessels include U.S. Coast Guard vessels, Department of Defense vessels, State and local law enforcement and emergency services vessels and vessels under contract with the U.S. Government. Vessels transiting the restricted area shall proceed across the area by the most direct route and without unnecessary delay. Fishing, trawling, net-fishing and other aquatic activities are prohibited in the restricted area without prior approval from the Commanding Officer, U.S. Coast Guard Group Mobile or his designated representative.

(c) *Enforcement.* The regulations in this section shall be enforced by the Commanding Officer, U.S. Coast Guard Group Mobile or his designated representative.

Dated: March 11, 2004.

**Michael B. White,**

*Chief, Operations, Directorate of Civil Works.*

[FR Doc. 04–8603 Filed 4–15–04; 8:45 am]

**BILLING CODE 3710–92–P**

#### **FEDERAL COMMUNICATIONS COMMISSION**

##### **47 CFR Part 73**

[DA 04–914; MM Docket No. 01–153, RM–10169]

#### **Radio Broadcasting Services; Tilden, TX**

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule; dismissal.

**SUMMARY:** In response to a *Notice of Proposed Rule Making*, 66 FR 38410 (July 24, 2001), this *Report and Order* dismisses the Petition for Rule Making in MM Docket No. 01–153, proposing to allot Channel 245C3 at Tilden, Texas. The proposal was dismissed because it is inconsistent with, and untimely filed in relation to, a previously-filed proposal in MM Docket No. 00–148.

**FOR FURTHER INFORMATION CONTACT:** Deborah A. Dupont, Media Bureau, (202) 418–2180.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Report and Order, MM Docket No. 01–153,

adopted April 2, 2004 and released April 5, 2004. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. The document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail [qualexint@aol.com](mailto:qualexint@aol.com).

Federal Communications Commission.

**John A. Karousos,**

*Assistant Chief, Audio Division, Media Bureau.*

[FR Doc. 04–8685 Filed 4–15–04; 8:45 am]

**BILLING CODE 6712–01–P**

#### **DEPARTMENT OF COMMERCE**

#### **National Oceanic and Atmospheric Administration**

##### **50 CFR Part 223**

[Docket No. 040412112–4112–01; I.D. 040104C]

**RIN 0648–AS02**

#### **Endangered and Threatened Wildlife; Sea Turtle Conservation Requirements**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Proposed rule.

**SUMMARY:** NMFS is proposing to amend the turtle excluder device (TED) regulations that require most shrimp trawlers to use TEDs in the southeastern Atlantic and the Gulf of Mexico to reduce the incidental capture of endangered and threatened sea turtles during shrimp trawling. Specifically, NMFS proposes to allow the use of a double cover flap TED with a modified flap design. This modification would allow the use of a flap that extends up to 24 inches (61 cm) past the posterior edge of the TED frame. This modification has been tested and meets the regulatory requirements for efficiency at releasing sea turtles.

**DATES:** Written comments (see **ADDRESSES**) will be accepted through May 3, 2004.

**ADDRESSES:** You may submit comments, identified by the docket number 040412112–4112–01 and/or the Regulatory Information Number (RIN) 0648–AS02, by any of the following

methods: (1) E-mail: 0648-AS02.proposed@noaa.gov. Include docket number 040412112-4112-01 and/or RIN number 0648-AS02 in the subject line of the message; (2) Federal eRulemaking Portal: <http://www.regulations.gov>.

Follow the instructions for submitting comments; (3) Fax: 727-570-5517, Attention Mr. Robert Hoffman; (4) Mail: Comments on paper, disk, or CD-ROM should be addressed to the Assistant Regional Administrator for Protected Resources, NMFS Southeast Regional Office, 9721 Executive Center Drive North, Suite 102, St. Petersburg, FL 33702.

All submissions received must include the agency name and docket number for this proposed rule. For access to the background documents or comments received, see contact information below.

**FOR FURTHER INFORMATION CONTACT:** Robert Hoffman (ph. 727-570-5312, fax 727-570-5517, e-mail [Robert.Hoffman@noaa.gov](mailto:Robert.Hoffman@noaa.gov)).

#### SUPPLEMENTARY INFORMATION:

##### Background

All sea turtles that occur in U.S. waters are listed as either endangered or threatened under the Endangered Species Act of 1973 (ESA). The Kemp's ridley (*Lepidochelys kempii*), leatherback (*Dermochelys coriacea*), and hawksbill (*Eretmochelys imbricata*) turtles are listed as endangered. The loggerhead (*Caretta caretta*) and green (*Chelonia mydas*) turtles are listed as threatened, except for breeding populations of green turtles in Florida and on the Pacific coast of Mexico, which are listed as endangered.

Sea turtles are incidentally taken and killed as a result of numerous activities, including fishery trawling activities in the Gulf of Mexico and along the Atlantic seaboard. Under the ESA and its implementing regulations, taking sea turtles is prohibited, with exceptions identified in § 223.206, or if in accordance with the terms and conditions of a biological opinion issued under section 7 of the ESA or an incidental take permit issued under section 10 of the ESA. The incidental taking of turtles during shrimp or summer flounder trawling is exempted from the taking prohibition of section 9 of the ESA if the conservation measures specified in the sea turtle conservation regulations (50 CFR part 223) are followed. The regulations require most shrimp trawlers and summer flounder trawlers operating in the southeastern United States (Atlantic area, Gulf area, and summer flounder sea turtle

protection area, see § 223.206 to have a NMFS-approved TED installed in each net that is rigged for fishing to provide for the escape of sea turtles. TEDs currently approved by NMFS include single-grid hard TEDs and hooped hard TEDs conforming to a generic description, the flounder TED, and one type of soft TED the Parker soft TED (see § 223.207).

TEDs incorporate an escape opening, usually covered by a webbing flap, that allows sea turtles to escape from trawl nets. To be approved by NMFS, a TED design must be shown to be 97 percent effective in excluding sea turtles during testing based upon specific testing protocols (§ 223.207(e)(1)). Most approved hard TEDs are described in the regulations (§ 223.207(a)) according to generic criteria based upon certain parameters of TED design, configuration, and installation, including height and width dimensions of the TED opening through which the turtles escape.

##### *February 21, 2003, Amendments to the Sea Turtle Conservation Regulations*

On February 21, 2003, NMFS issued a final rule (68 FR 8456), amending the sea turtle conservation regulations to protect large loggerhead, green, and leatherback sea turtles. The February 2003 final rule requires that all shrimp trawlers fishing in the offshore waters of the southeastern United States (Atlantic area and Gulf area) and the inshore waters of Georgia and South Carolina use either a double cover flap TED, a single-grid hard TED with a 71-inch (180-cm) opening, or a Parker soft TED with a 96-inch (244-cm) opening in each net rigged for fishing. In inshore waters, except those of Georgia and South Carolina, the rule allows the use of a single-grid hard TED with a 44-inch (112-cm) opening, a Parker soft TED with a 56-inch (142-cm) opening, and a hooped hard TED with a 35-inch (89-cm) by 27-inch (69-cm) escape opening.

Since publication of the final rule, fishermen have reported that the current double cover flap TED design stretches over time. This stretching causes a gap between the flap panels and the grid frame which causes shrimp loss.

Since September 2003, and in accordance with § 223.207(e)(2), NMFS has issued 208 experimental permits to fishermen to test a modified double cover flap TED with longer flap panels. This modification to the double cover flap TED was designed by NMFS gear technicians in cooperation with industry. The modification incorporates the use of flap panels that extend 24 inches (61 cm) past the posterior edge

of the TED frame and are sewn down the entire length of the outside edge of each flap panel. The current double cover flap TED design only allows the flap panels to extend 6 inches (15 cm) past the posterior edge of the TED frame. Interviews with permitted fishermen have indicated that the new design works well.

##### *Long Flap Paneled Double Cover Flap TED Testing*

NMFS tested the modified double cover flap TED using testing protocols designed to evaluate a TED's ability to release large turtles. The protocols were developed during the testing and approval of the double cover flap TED (66 FR 24287, May 14, 2001). NMFS used the average carapace measurements of 15 nesting female leatherback turtles to construct a pipe-framed model of a leatherback turtle. This model measured 40 inches wide by 21 inches (102 cm by 53 cm) deep. The test was performed by a diver swimming repeatedly through the trawl with the model and pushing it through the TED opening. During these tests, the diver was able to push the model through the opening with ease. When the model was inverted (simulating the dorsal surface of the turtle oriented against the TED frame), the diver was still able to push the model through the opening with ease.

The long flap double cover flap TED was also tested for its ability to release wild turtles of a range of sizes using a modified version of the Cape Canaveral testing protocol published in the **Federal Register** on October 9, 1990, (55 FR 41092). The 1990 protocol called for the use of a series of double rigged tows, in an area with a high sea turtle concentration (such as the Cape Canaveral Shipping Channel), in which one trawl is a naked net (no TED) and the other includes the experimental TED. The catch of turtles in the naked net is compared to the captures in the net with the TED installed to determine if the TED was at least 97 percent effective at releasing turtles as required by § 223.207(e)(1). NMFS has modified this protocol to better protect turtles and to increase its accuracy. The modifications include the use of two trawls, each rigged with the experimental TED and a video camera mounted by the TED escape opening that can be monitored on board the research vessel. Once the NMFS technician on board the research vessel sees a turtle encounter the TED, the turtle is given 10 minutes to escape. If the turtle does not escape within 10 minutes, the trawl is retrieved and the turtle is released. Any turtle that does

not escape within 10 minutes is considered to have been captured.

Using this modified Cape Canaveral protocol, NMFS tested the modified double cover flap TED off the coast of Georgia between November 13 and November 18, 2003, and in the Cape Canaveral Channel between February 19 through March 12, 2004. In total, 33 turtles were exposed to this TED with 32 of the turtles escaping within the 10-minute exposure period for a 97 percent success rate. The turtles exposed to the modified double cover flap TED included one leatherback, seven Kemp's ridleys, and 25 loggerheads. The single turtle that did not escape within the 10 minute limit was a juvenile loggerhead.

### Provisions of the Proposed Rule

The proposed rule would allow the use of a double cover flap TED with flap panels that extend between 6 inches (15 cm) but no more than 24 inches (61 cm) past the posterior edge of the grid with the use of edge lines in all areas and at all times where and when TEDs are required. The proposed rule would only modify the existing requirements for the double cover flap TED in a permissive manner, i.e. fishermen may now use longer flaps and edge lines on double cover flap TEDs, and they are not required to change existing gear.

Specifically, the proposed rule would allow a single-grid hard TED with the escape opening cut of at least 56 inches (142 cm) wide and 20 inches (51 cm) forward and aft, covered with a split flap composed of two equal size rectangular panels. Each panel must be no less than 58 inches (147 cm) wide and may overlap each other no more than 15 inches (38 cm). The panels may only be sewn together along the leading edge of the cut. The edge of the panels may extend no more than 24 inches (61 cm) past the posterior edge of grid, and may be sewn down the entire length of the outside edge of each flap panel. To better preserve the shape of the webbing panels over time, edge lines can be used around the edges of the unattached portion of the flap panels to help maintain the shape of the flap. Edge lines can only be used if the flap panels are sewn down the entire length of the outside edge of each flap panel.

### Classification

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

NMFS prepared a draft environmental assessment/intitil regulatory impact review/Regulatory Flexibility Act analysis (EA/RIR/IRFA) for this proposed rule that evaluates the potential impact on the environment

that may result from the proposed rule. The EA/IRFA/RIR found that the implementation of this proposed rule will not have a significant impact on the quality of the human environment and that the preparation of an environmental impact statement is not necessary.

It is estimated that 11,244 small vessels (vessels less than or equal to 60 ft (18.3 m)) and 2,368 large vessels (vessels greater than 60 ft (18.3 m)), or a total of 13,572 vessels, operate in the Southeast shrimp fishery. Among these vessels, approximately 2,600 vessels are currently permitted to operate in the Gulf of Mexico EEZ commercial shrimp trawl fishery. Small vessels in the Southeast shrimp trawl fishery are estimated to harvest an average of 4,752 lb (2,155 kg) of shrimp valued at \$12,435 in gross revenues, requiring average variable cost expenditures of \$8,708 and generating a profit of \$3,727. Large vessels in the Southeast shrimp trawl fishery are estimated to harvest an average of 42,656 pounds of shrimp valued at \$142,880 in gross revenues, requiring average variable cost expenditures of \$126,089 and generating a profit of \$16,089. All participants in the trawl fishery would be affected by the proposed action in that each would have the opportunity to utilize proposed gear modification. However, the preferred alternative would not impose a requirement to use the proposed longer flaps, nor would the use of double-cover TEDs rather than other certified TED designs be required. The proposed rule, therefore, would create options and not obligations. Use of the proposed modified TED will require no special skills other than those currently necessary to operate in the fishery. No duplicative, overlapping, or conflicting Federal rules have been identified. All business entities participating in the commercial shrimp fisheries are considered small entities, so the issue of disproportionality does not arise. The proposed rule will not impose any additional fishing restrictions on participants in the fishery. The proposed rule would simply allow greater flexibility to select the gear configuration that best suits the operational conditions of the individual shrimping operation. Thus, current operational behaviors, including when to shrimp, where to shrimp, and how long to shrimp, as well as where product is marketed, can continue unchanged. Minor costs associated with additional netting necessary to extend the flaps may be incurred. However, these costs should not impact profitability and, in fact, would only be incurred should the operator determine

that the current flap dimensions result in excessive shrimp loss, such that modification would result in a net financial gain. Thus, no reduction in profits are expected for any small entities.

The proposed rule is not expected to result in any direct adverse economic impacts on small entities. The issue of significant alternatives is, therefore, not relevant. However, two alternatives were considered but not analyzed for their economic impact. The first was to allow the longer flap, but at a maximum length of something less than 24 inches (60.96 cm). The second was to allow the longer flap with a maximum length of 24 inches (60.96 cm) but only allow it to be sewn down each side by six inches. Tests of the long flap double cover flap TED, with a 24-inch (60.96-cm) flap sewn all the way down both sides (the flap configuration of the preferred alternative), have shown that this flap configuration is at least 97 percent effective at releasing sea turtles; therefore, to approve either of these more restrictive alternatives would arbitrarily limit a fisherman's ability to modify his gear. Therefore the only alternatives considered for further analysis were the preferred action and the no action alternative. The no action alternative would maintain current flap specifications, thereby continuing reported, but unsubstantiated and unquantified, shrimp loss that results from stretching of the flaps. This alternative, therefore, would not eliminate the unanticipated shrimp loss associated with current specifications, nor provide gear flexibility as per the NMFS' intent.

A copy of the EA/RIR/IRFA is available from NMFS (see **ADDRESSES**).

The Endangered Species Act provides the statutory basis for this proposed rule.

### List of Subjects in 50 CFR Part 223

Endangered and threatened species, Exports, Imports, Marine mammals, Transportation.

Dated: April 12, 2004.

**John Oliver,**

*Deputy Assistant Administrator for Operations, National Marine Fisheries Service.*

For the reasons set out in the preamble, 50 CFR part 223 is proposed to be amended as follows:

### PART 223—THREATENED MARINE AND ANADROMOUS SPECIES

1. The authority citation for part 223 continues to read as follows:

**Authority:** 16 U.S.C. 1531 *et seq.*

2. In § 223.207, paragraphs (d)(3)(iii) is revised to read as follows:

**§ 223.207 Approved TEDs.**

\* \* \* \*

(d) \* \* \*

(3) \* \* \*

(iii) *Double cover flap offshore TED flap.* This flap must be composed of two equal size rectangular panels of webbing. Each panel must be no less than 58 inches (147 cm) wide and may overlap each other no more than 15 inches (38 cm). The panels may only be

sewn together along the leading edge of the cut. The trailing edge of each panel must not extend more than 24 inches (61 cm) past the posterior edge of the grid (Figure 16 to this part). Each panel may be sewn down the entire length of the outside edge of each panel. Chafing webbing described in paragraph (d)(4) of this section may not be used with this type of flap.

(A) *Edge lines.* Optional edge lines can be used in conjunction with this flap. The line must be made of

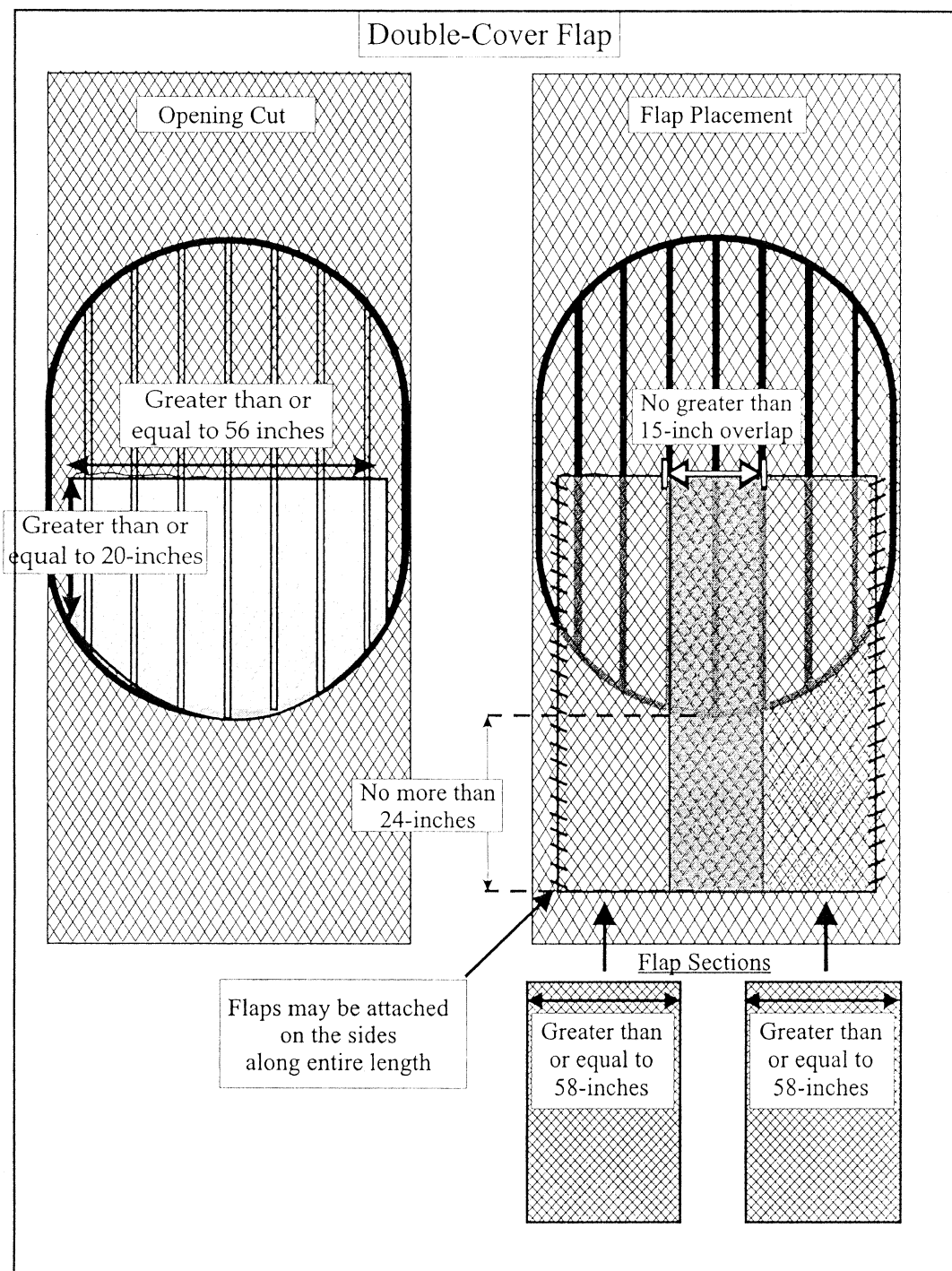
polyethylene with a maximum diameter of 3/8 inches (.95 cm). A single length of line must be used for each flap panel. The line must be sewn evenly to the unattached, inside edges and trailing edges, of each flap panel. When edge lines are installed, the outside edge of each flap panel must be attached along the entire length of the flap panel.

(B) [Reserved]

3. In part 223, Figure 16 is revised to read as follows:

**BILLING CODE 3510-22-S**

FIGURE 16 TO PART 223—ESCAPE OPENING AND FLAP DIMENSIONS FOR THE  
DOUBLE COVER FLAP TED



This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

## ADVISORY COUNCIL ON HISTORIC PRESERVATION

### Amendments to the Army Alternate Procedures

**AGENCY:** Advisory Council on Historic Preservation.

**ACTION:** Notice of approval of amendments to the Army Alternate Procedures.

**SUMMARY:** On March 25, 2004, the Advisory Council on Historic Preservation approved technical and administrative amendments to the Army Alternate Procedures. Those Army Alternate Procedures set forth a process that Army installations can follow in order to meet their historic preservation review responsibilities under the National Historic Preservation Act. The main purposes of the amendments are to conform the Alternate Procedures to the Army's internal reorganization, and clarify its exemption regarding designated surface danger zones.

**DATES:** The amendments to the Army Alternate Procedures went into effect on March 25, 2004.

**FOR FURTHER INFORMATION CONTACT:** Mr. David Berwick, Army Program Manager, Advisory Council on Historic Preservation, 1100 Pennsylvania Avenue, NW., Suite 809, Washington, DC 20004. [dberwick@achp.gov](mailto:dberwick@achp.gov).

**SUPPLEMENTARY INFORMATION:** Section 106 of the National Historic Preservation Act, 16 U.S.C. 470f, requires Federal agencies to consider the effects of undertakings on historic properties and provide the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment with regard to such undertakings. The ACHP has issued the regulations that set forth the process through which Federal agencies comply with these duties. The regulations are codified under 36 CFR part 800 ("Section 106 regulations").

The section 106 regulations, under 36 CFR 800.14(a), provide that an agency may develop procedures to implement section 106 and substitute them for subpart B as long as they are consistent with the section 106 regulations.

### I. Background

On July 13, 2001, the ACHP approved the Army Alternate Procedures (AAP). These were subsequently adopted by the Army and published in the **Federal Register** on March 6, 2002. For further general background on the AAP as originally adopted, please refer to that **Federal Register** notice (67 FR 10138).

Since then, the Army has internally reorganized in a way that directly affects the implementation of the AAP. This reorganization required revisions of the AAP to reflect the new management structure adopted by the Army. Without changes to the AAP, it would be difficult for the Army to implement the procedures as originally adopted. Furthermore, continued use of the AAP, as originally published, would create confusion with consulting parties who wish to contact Army personnel concerning AAP implementation, since the roles of Army staff have changed. Other technical amendments were also needed to clarify certain aspects of the AAP.

Therefore, pursuant to section 7.1(d) of the AAP, the Chairman of the ACHP approved the technical and administrative amendments to the AAP outlined below. These amendments went into effect on March 25, 2004.

### II. Summary of Amendments

This section summarizes the changes made to the AAP.

The name "Army Alternate Procedures to 36 CFR Part 800" has been changed to "Army Alternate Procedures for Historic Properties" to more easily identify these procedures with the Army's historic preservation requirements.

With the Army's new Installation Management Agency (IMA) structure, the responsibility for implementing the AAP has shifted from the installation commander to the garrison commander. As a result, all references to installation commander in the AAP have been changed to reflect this new structure. Likewise, IMA now assumes the roles and responsibilities given in the AAP to the major commands (MACOMs). Reference to MACOMs has been

changed to reflect the new structure. Internal coordination, from garrison commanders, through the IMA, National Guard Bureau or applicable MACOM to the Assistant Chief of Staff for Installation Management has been clarified.

Reference to AR 200-4 (a Cultural Resources Management policy of the Army) has been replaced with the more general term "Army policy." AR 200-4 is scheduled to be incorporated into AR 200-1; however, this has not been completed at this time.

The more cumbersome phrasing of "commanders electing to comply with" has been simplified by saying "commanders complying with." Since the AAP clearly states that following its process (as opposed to the one outlined in subpart B of the Section 106 regulations) is optional, it was not necessary to reiterate this optional nature throughout the AAP.

The following specific changes have been made to the AAP and are referenced here by the sections in which these changes can be found.

**Section 1.1(e) (Application):** In the previously published version of the AAP, this section was a fairly lengthy discussion of the optional features of the AAP. This section has been shortened and more clearly states that the authority to operate, or not operate, under the AAP rests with the Army.

**Section 1.6 (Participants):** This section was substantially changed to reflect the new Army structure. As explained above, the IMA, as the Army's installation management agency, is now responsible for ensuring that garrison commanders have identified and programmed the resources necessary to meet the installation's responsibilities under the AAP. The Assistant Chief of Staff for Installation Management (ACSIM) will not only be reviewing an installation's Historic Properties Component (HPC) but will endorse it before it is sent back to the installation. These changes will provide more consistency in application throughout the Army and will assist the ACHP and Army Headquarters in fulfilling program review responsibilities outlined in section 7.1 of the AAP.

**Section 4.5 (Exempted Undertakings):** This section adds an example to the exemption regarding "military activities in existing designated surface danger zones" (subsection (a)(3)(iv)) to clarify

that surface danger zones are only exempt where there is imminent threat to human health and safety, such as in dudded impact areas where unexploded ordnance exists.

### III. Text of AAP as Amended

What follows is the full text of the AAP as amended (copies of the amended AAP can also be found on the ACHP Web site at [www.achp.gov/army.html](http://www.achp.gov/army.html)):

#### Army Alternate Procedures for Historic Properties

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##### Section 1.0: Introduction

#### 1.1 Purpose and Introduction

(a) *Purpose.* Section 106 of the National Historic Preservation Act (Act) requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the Advisory Council on Historic Preservation (Council) a reasonable opportunity to comment on such undertakings. The section 106 process

seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation between the Army, and consulting parties and the public. The purposes of these alternate procedures are to provide for more efficient, consistent and comprehensive Army compliance with the goals and mandates of section 106 of the Act, to encourage more thoughtful consideration and early planning for historic properties, and to better support the Army's ability to accomplish its national defense mission. These alternate procedures further these purposes by establishing a proactive planning and management approach that stands in place of the formal project-by-project review process prescribed by the Council's regulations at 36 CFR part 800. The approach set forth in these alternate procedures relies on the Army's existing internal planning, funding and decision making processes.

(b) *Relation to other provisions of the Act.* Section 106 is related to other provisions of the Act designed to further the national policy on historic preservation. References to those related provisions are included in these procedures to identify circumstances where actions may be affected by the independent obligations of those other provisions.

(c) *Relation to internal Army Regulations.* Internal agency policy sets forth the Army's requirements for complying with the Act, the Archeological Resources Protection Act (ARPA), the Native American Graves Protection and Repatriation Act (NAGPRA), the American Indian Religious Freedom Act (AIRFA), Indian Sacred Sites under Executive Order 13007 (Indian Sacred Sites), Executive Order 13175, (Consultation and Coordination with Indian Tribal Governments), and 36 CFR part 79 (Curation of Federally-Owned and Administered Archaeological Collections). The Army requires all installations (other than those receiving a variance) to prepare an Integrated Cultural Resource Management Plan (ICRMP). The ICRMP integrates the entirety of the installation cultural resources program with the ongoing military mission, allows identification of potential conflicts between the installation's mission and cultural resources, and identifies actions necessary to meet statutory and regulatory requirements.

(d) These procedures utilize to the maximum extent possible existing internal Army program requirements to meet section 106 requirements. Each

ICRMP developed by an installation shall have a Historic Properties Component (HPC) to ensure compliance with section 106 of the Act on a programmatic, as opposed to project-by-project, basis. Individual installations shall coordinate with internal staff elements, consult with consulting parties, and, where appropriate, consider the views of the public, on development of the HPC to ensure that the HPC includes adequate procedures for identification, evaluation, and treatment of historic properties over the five-year ICRMP planning period. Installations shall substantially involve consulting parties on development of the HPC, not the entire ICRMP, since other components of the ICRMP involve management of cultural resources beyond the statutory and regulatory authority and jurisdiction of consulting parties. Neither these procedures nor a certified HPC relieves the Army of its responsibilities to comply with other cultural resources laws such as NAGPRA and ARPA.

(e) *Application.* These alternate procedures recognize that certain installations may be operating under the review procedures in 36 CFR part 800. Application of these alternate procedures and the authority to revert to operation under 36 CFR part 800 rests with the Army.

(f) *Role of consulting parties.* These alternate procedures promote early and effective participation of State Historic Preservation Officers (SHPOs), Tribal Historic Preservation Officers (THPOs), Federally recognized Indian Tribes, and Native Hawaiian organizations in Army planning and management of historic properties. These consulting parties play a regulatory role in development of and signature on the HPC. Once the HPC has been finalized, SHPOs, THPOs, Federally recognized Indian Tribes, and Native Hawaiian organizations will have continued opportunities to participate in implementation by reviewing and monitoring installation compliance and providing expertise concerning identification, evaluation, and management of historic properties. These alternate procedures establish minimum requirements for compliance. Installations are encouraged to tailor their planning documents to their particular needs, and, where appropriate, supplement these minimum requirements.

(g) *Role of the public.* The public includes national, regional, or local organizations and individuals with an interest in historic preservation, and local governments when not participating as consulting parties. Public views are important to a fully

informed decision making process under these procedures. The process established by the National Environmental Policy Act (NEPA), as implemented by the regulations published by the Council on Environmental Quality and Army Regulation 200-2 "Environmental Effects of Army Actions" (AR 200-2) is designed to ensure meaningful public participation in Federal agency decision making. Installation commanders will use the NEPA process to the greatest extent practicable to provide for public participation under these procedures for installation activities.

(h) Nothing in these procedures changes any rights reserved to any Indian Tribe by treaty or otherwise granted to any Indian Tribe, Native Hawaiian organization, or to their members by Federal law, including Statute, regulation or Executive Order. These procedures are designed to ensure that the Army fully meets its responsibilities to consult with Federally recognized Indian Tribes and Native Hawaiian organizations when Army activities may affect historic properties of traditional religious and cultural importance to them.

#### 1.2 Methods of Complying With Section 106 of the Act

(a) Each installation complying with section 106 of the Act through these procedures in lieu of 36 CFR part 800 will develop a Draft HPC, in consultation with consulting parties, and request certification of its HPC from the Council. Once certified, an installation shall comply with section 106 of the Act through implementation of its HPC for a five-year period.

(b) Prior to HPC certification, installations shall continue to comply with section 106 of the Act by reviewing undertakings pursuant to 36 CFR part 800.

(c) Installations that do not comply with section 106 of the Act through these procedures shall continue to comply with section 106 of the Act by following 36 CFR part 800.

(d) Where the Army proposes to conduct any undertaking on Tribal land where a Federally recognized Indian Tribe has developed Tribal historic preservation regulations pursuant to section 101(d)(5) of the Act, and those regulations operate in place of review under 36 CFR part 800, the Army shall follow those Tribal historic preservation regulations prior to approving and while conducting the undertaking.

#### 1.3 Authority

(a) These procedures are promulgated pursuant to section 110(a)(2)(E) of the

Act (16 U.S.C. 470h-2) which directs Federal agencies to develop procedures for implementing section 106 of the Act, and 36 CFR 800.14(a) which authorizes Federal agencies, in consultation with the Council, to develop alternative procedures to implement the section 106 process, that, after Council concurrence, substitute for the regulations set forth in 36 CFR part 800. The Council retains final authority to determine whether the Army's alternate procedures are consistent with 36 CFR part 800.

#### 1.4 Scope

(a) These procedures apply to all levels of the Active Army, the Army National Guard, the U.S. Army Reserve, including all installations and activities under the control of the Army by ownership, lease, license, public land withdrawal, or, any similar instrument, where the Agency Official elects to comply with these procedures in lieu of 36 CFR part 800. All of the above shall be referred to in these procedures as the Army, unless otherwise noted.

(b) These procedures do not apply to the Civil Works functions of the U.S. Army Corps of Engineers.

(c) These procedures shall not apply to installations or activities where the Garrison commander has elected, pursuant to section 2.1, to continue to comply with section 106 of the Act through the process set forth under 36 CFR part 800.

#### 1.5 Definitions

*Act* means the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470 *et seq.*).

*Adverse effects* are those effects of an undertaking that may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion on the National Register of Historic Places (National Register) in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. The criteria of adverse effect also require consideration of all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.

*Agency Official* is the Army official with jurisdiction over an undertaking as set forth in section 1.6(a).

*Area of potential effects (APE)* means the geographic area or areas within which an undertaking may directly or indirectly cause changes in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.

*Army* means Active Army, Army National Guard, U.S. Army Reserve, and all installations and activities as described in section 1.4.

*Comment*, when used in relation to the Council, means the findings and recommendations of the Council formally provided in writing to the Secretary of the Army under section 106 of the Act.

*Consulting parties* are those parties that have a consultative role in the section 106 process; these parties are the SHPO, the THPO, Federally recognized Indian Tribes, Native Hawaiian organizations, representatives of local governments, and applicants for Federal permits, licenses, assistance or other forms of Federal approval. Members of the public may participate as consulting parties upon the invitation of the Garrison commander.

*Consultation* means the formal process of seeking, discussing, identifying and considering the views of consulting parties. For purposes of these procedures, consultation with Federally recognized Indian Tribes means consultation on a government-to-government basis as defined below.

*Coordination*, for the purposes of these procedures, means the informal communication and exchange of information and ideas between consulting parties concerning historic preservation issues affecting the Army. Coordination is intended to be an informal process, on a staff-to-staff basis, for routine management issues as distinguished from the formal consultation and tribal consultation processes as defined by these procedures.

*Council* means the Advisory Council on Historic Preservation or a Council member or employee designated to act for the Council.

*Day or days* means calendar days.

*Effect* means alteration to the characteristics of an historic property that qualify it for inclusion in or make it eligible for inclusion in the National Register.

*Federally recognized Indian Tribe*, for the purposes of these procedures, means: (i) an Indian or Alaska Native Tribe, band, nation, pueblo, village or community within the continental United States presently acknowledged

by the Secretary of the Interior to exist as an Indian Tribe pursuant to the Federally Recognized Indian Tribe List Act, Public Law 103-454; and (ii) Regional Corporations or Village Corporations, as those terms are defined in section 3 of the Alaskan Native Claims Settlement Act (43 U.S.C. 1602), which are recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

*Government-to-government relations*, for the purposes of these procedures, means relations formally established between the Army and Federally recognized Indian Tribes through their respective governmental structures. In recognition of a Federally recognized Indian Tribe's status as a sovereign nation, formal government-to-government relations are established and maintained directly between Garrison commanders and the heads of Tribal governments. Garrison commanders initiate government-to-government relations with Federally recognized Indian Tribes by means of formal, written communication to the heads of Tribal governments. Such letters should designate an installation official who is authorized to conduct follow-on consultations with the Tribe's designated representative. Garrison commanders are encouraged to meet face-to-face with the heads of Tribal governments as part of the process to initiate government-to-government consultation. Any final decisions on installation HPCs that have been the subject of government-to-government consultation will be formally transmitted from the Garrison commander to the head of the Tribal government.

*Historic preservation or preservation* includes identification, evaluation, recordation, documentation, curation, acquisition, protection, management, rehabilitation, restoration, stabilization, maintenance, research, interpretation, conservation, and education and training regarding the foregoing activities or any combination of the foregoing activities.

*Historic property* means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register maintained by the Secretary of the Interior. The term includes artifacts, records, and remains that are related to and located within such properties. The term includes historic properties of traditional religious and cultural importance to a Federally recognized Indian Tribe or Native Hawaiian organization. The term "eligible for inclusion in the National

Register" includes both properties formally determined as such in accordance with regulations of the Secretary of the Interior and all other properties that meet the National Register criteria.

*Historic Properties Component (HPC)* means, in accordance with these procedures, that portion of the ICRMP which relates directly to the implementation of section 106 of the Act. The HPC is a five-year plan that provides for installation identification, evaluation, assessment of effects, treatment, and management of historic properties, including those of traditional religious and cultural importance to a Federally recognized Indian Tribe or Native Hawaiian organization. The HPC is the basis upon which an installation's program is evaluated for certification for purposes of these procedures. While the HPC remains a component of the ICRMP, it stands alone as a legal compliance document under these procedures.

*Installation* means a grouping of facilities located in the same vicinity, which are under control of the Army and used by Army organizations. This includes land and improvements. In addition to those used primarily by soldiers, the term "installation" applies to real properties such as depots, arsenals, ammunition plants (both contractor and government operated), hospitals, terminals, and other special mission installations. The term may also be applied to a state or a region in which the Army maintains facilities. For example, the Army National Guard may consider National Guard facilities within a state to be one installation and the U.S. Army Reserve may consider Regional Support Centers to be installations. Under these procedures, a subinstallation may be certified individually or as part of its support installation.

*Integrated Cultural Resources Management Plan (ICRMP)* is a five-year plan developed and implemented by a Garrison commander to provide for the management of cultural resources in a way that maximizes beneficial effects on such resources and minimizes adverse effects and impacts without impeding the mission of the Army.

*National Historic Landmark (NHL)* means a historic property that the Secretary of the Interior has designated a National Historic Landmark pursuant to the Historic Sites Act of 1935, Public Law 100-17.

*National Register* means the National Register of Historic Places maintained by the Secretary of the Interior.

*National Register Criteria* means the criteria established by the Secretary of

the Interior for use in evaluating the eligibility of properties for the National Register (36 CFR part 60).

*Native Hawaiian* means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

*Native Hawaiian organization* means any organization which (1) serves and represents the interests of Native Hawaiians, (2) has as a primary and stated purpose the provision of services to Native Hawaiians, and (3) has demonstrated expertise in aspects of historic preservation that are significant to Native Hawaiians. Such organizations include the Office of Hawaiian Affairs and Hui Malama I Na Kupuna 'O Hawai'i Nei.

*NEPA process* means the decision making process established by the National Environmental Policy Act as implemented by the regulations published by the Council on Environmental Quality and AR 200-2. The NEPA process involves preparation of a NEPA document, either a Record of Environmental Consideration, an Environmental Assessment (EA) or an Environmental Impact Statement (EIS), followed by a decision document. An EA results in either a Finding of No Significant Impact or Notice of Intent to prepare an EIS. An EIS results in a Record of Decision.

*Professional standards* means, for the purposes of these procedures, those standards set forth in the Secretary of Interior's Standards and Guidelines for Archeology and Historic Preservation (48 FR 44716), which apply to individuals conducting technical work for the Army. Tribal members and Native Hawaiians are uniquely qualified to identify and assist in the evaluation, assessment of effect, and treatment of historic properties to which they attach traditional religious and cultural importance. When the Army requests assistance from Federally recognized Indian Tribes and Native Hawaiian organizations to aid in the identification, evaluation, assessment of effects and treatment of historic properties of traditional religious and cultural importance, such Tribal members and Native Hawaiians need not meet the Secretary of Interior's Professional Qualifications Standards (48 FR 44738-44739).

*Review and monitoring* means an informal process in which an installation shall coordinate with consulting parties to discuss proposed undertakings for the upcoming year, results of plan implementation during the previous year, the overall

effectiveness of the installation's HPC, and the need for making amendments to it. At a minimum, this review and monitoring shall be conducted annually.

*Sovereign or sovereignty*, with respect to Federally recognized Indian Tribes means the exercise of inherent sovereign powers over their members and territories.

*State Historic Preservation Officer (SHPO)* means the official appointed or designated pursuant to section 101(b)(1) of the Act to administer the state historic preservation program or a representative designated to act for the State Historic Preservation Officer.

*Surface Danger Zone* means the area designated on the ground of a training complex (to include associated safety areas) for the vertical and lateral containment of projectiles, fragments, debris, and components resulting from the firing or detonation of weapon systems to include exploded and unexploded ordnance.

*Tribal consultation* means seeking, discussing, identifying and considering Tribal views through good faith dialogue with Federally recognized Indian Tribes on a government-to-government basis in recognition of the unique relationship between Federal and Tribal governments and the status of Federally recognized Indian Tribes as sovereign nations (see government-to-government relations). The Tribal Historic Preservation Officer (THPO) serves as the Tribal official for government-to-government consultation for undertakings affecting historic properties off Tribal lands only where the Tribal government has designated the THPO as the Tribe's designated representative responsible for carrying out such functions.

*Tribal Historic Preservation Officer (THPO)* means the Tribal official, appointed by the head of the Tribal government or as designated by a Tribal ordinance or preservation program, who has assumed the responsibilities of the SHPO for purposes of section 106 compliance on Tribal lands in accordance with section 101(d)(2) of the Act.

*Tribal lands* mean all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.

*Undertaking* means a project, activity, or program that is funded in whole or in part under the direct or indirect jurisdiction of the Army, including those carried out by or on behalf of the Army, those carried out in whole or in part with Army funds, and those requiring Army approval.

## 1.6 Participants

### (a) Army.

(1) The Army Agency Official with jurisdiction over an undertaking takes legal and financial responsibility for section 106 compliance either through implementing these alternate procedures or continuing operation under 36 CFR part 800. For purposes of these procedures, the Army Agency Official with jurisdiction over an undertaking is the Garrison commander or official representative designated by the Garrison commander. The Army Agency Official shall ensure that professional standards, as defined in section 1.5, are met in the conduct of identification, evaluation, assessment of effects, and treatment of historic properties.

(i) Deputy Assistant Secretary of the Army (Environment, Safety and Occupational Health) (DASA (ESOH)) is the Army Federal Preservation Officer (FPO), pursuant to designation by the Assistant Secretary of the Army (Installations and Environment), responsible for policy, program direction and oversight of the Army's responsibilities under the Act. The DASA (ESOH) is responsible for ensuring the Army's implementation of these alternate procedures.

(ii) The ACSIM is the Army staff proponent for implementing the Act and development of Army-specific guidance implementing the Act. Proponents for execution of ACSIM responsibilities under these procedures are the Director of Environmental Programs (DEP) and the Commander, U.S. Army Environmental Center (USAEC). The ACSIM shall:

(A) Carry out the ACSIM's assigned staff functions for NHPA compliance in accordance with Army regulations;

(B) Review and endorse AAP notices, HPCs, associated documents, and installation historic preservation programs in accordance with these procedures and,

(C) Serve as the Agency Official for the Army for purposes of consultation and coordination with consulting parties and the public on development of these alternate procedures, amendment and implementing guidance.

(iii) Installation Management Activity (IMA), National Guard Bureau (NGB) or applicable MACOM shall:

(A) Ensure Garrison commanders (includes Adjutants General) identify and program resources necessary to meet the requirements of these procedures. Staff all actions in accordance with these procedures.

(B) Review HPCs prepared by Garrison Commanders to ensure that

HPCs provide equitable, efficient and effective resource management.

(C) Forward AAP notices and HPCs to the ACSIM for review and endorsement.

(iv) Garrison Commanders (includes Commanders of U.S. Army Reserve Regional Support Centers and Adjutants General) shall:

(A) Carry out their assigned historic property management and compliance responsibilities set forth in Army policy;

(B) As the Agency Officials responsible for installation undertakings, ensure that such undertakings are implemented in accordance with either these procedures or 36 CFR part 800;

(C) Develop a historic preservation program, including an HPC, in accordance with section 3.0 and Army policy;

(D) Serve as the Agency Official responsible for consulting on HPC and its implementation with SHPOs, THPOs, Native Hawaiian organizations, and Federally recognized Indian Tribes when required under these procedures. Tribal consultation shall occur with Federally recognized Indian Tribes on a government-to-government basis, as defined in section 1.5; and,

(E) Ensure that such consultation provides a reasonable opportunity for the SHPO, THPO, Federally recognized Indian Tribes, and Native Hawaiian organizations to identify their concerns with the identification, evaluation, assessment of effect and treatment of historic properties, and after consideration, address such concerns.

(F) When implementing these procedures:

(1) Sign the HPC and amendments thereto, recognizing that the HPC is the installation's procedure for complying with section 106 of the Act;

(2) Invite the SHPO, THPO, Federally recognized Indian Tribe or Native Hawaiian organization to consult in development of and sign the HPC;

(3) Implement a signed HPC to comply with section 106 of the Act; and,

(4) Prior to certification, comply with section 106 of the Act through review of undertakings under 36 CFR part 800.

(b) Advisory Council on Historic Preservation.

(1) The Council issues regulations to implement section 106 of the Act; provides guidance and advice on the application of its regulations, 36 CFR part 800; oversees the operation of the section 106 process; enters into agreements with Federally recognized Indian Tribes under section 101(d)(5) of the Act; and approves Federal agency procedures for substitution of the Council's regulations. Consulting parties and the public, may at any time seek

advice, guidance, and assistance from the Council on the application of these procedures.

(2) For the purposes of these procedures, the Council reviews and evaluates HPCs and certifies that an installation is authorized to implement an approved HPC.

(c) State Historic Preservation Officer.

(1) The SHPO administers the national preservation program at the State level and is responsible for conducting comprehensive statewide surveys of historic properties and for maintaining inventories of these properties. Under section 101(b)(3)(E) of the Act, SHPOs are directly responsible for advising and assisting Federal agencies, such as the Army, in carrying out their historic preservation responsibilities. For purposes of these procedures, the SHPO advises and consults with individual installations in the development, implementation, recertification and Major Amendment of the HPC.

(2) The SHPO has access to expertise regarding historic properties within the State. The SHPO, throughout HPC implementation, may provide assistance to the Garrison commander and ensure access to and application of such expertise.

(3) When participating as a consulting party, the SHPO is invited to sign the HPC.

(d) Federally Recognized Indian Tribes and Native Hawaiian Organizations.

(1) Section 101(d)(6)(B) of the Act requires the Army to consult with any Federally recognized Indian Tribe and Native Hawaiian organization that attaches traditional religious and cultural importance to historic properties that may be affected by an undertaking. For Federally recognized Indian Tribes, this consultation may take place for historic properties located both on and off Tribal lands. Consultation with Federally recognized Indian Tribes shall be conducted as Tribal consultation and initiated on a government-to-government basis, and shall occur through the provisions of these procedures. While Garrison commanders must invite Federally recognized Indian Tribes to participate in government-to-government consultation, as sovereign nations, such Tribes may decline to participate.

(2) Where an installation's undertakings may affect historic properties of traditional religious and cultural importance to a Federally recognized Indian Tribe or Native Hawaiian organization, that Tribe or organization shall be invited to participate as a consulting party on the

development, implementation, recertification and Major Amendment to the HPC.

(3) When participating as consulting parties, Federally recognized Indian Tribes and Native Hawaiian organizations shall be invited to sign the HPC.

(e) Tribal Historic Preservation Officer.

(1) Where the Secretary of the Interior has authorized a Federally recognized Indian Tribe to carry out some or all of the SHPO responsibilities on Tribal lands pursuant to section 101(d)(2) of the Act, the THPO acts as a consulting party on the development, implementation, recertification and Major Amendment to the HPC. The THPO participates as a consulting party when:

(i) An installation's undertakings occur on or affect historic properties on Tribal lands; or,

(ii) An installation's undertakings may affect a historic property of traditional religious and cultural importance to the Tribe both on and off Tribal lands, and the THPO is the Tribe's designated representative for government-to-government consultation.

(2) When the THPO has participated as a consulting party, the Federally recognized Indian tribe which he or she represents is invited to sign the HPC.

(f) The Public.

(1) The Garrison commander shall seek and consider the views of the general public regarding the development, implementation, and recertification of the HPC in a manner consistent with section 3.5 and section 5.2 below.

## *Section 2.0: Applicability of Procedures*

### *2.1 Installation Determination*

(a) Garrison commanders complying with these procedures in lieu of 36 CFR part 800 shall document that determination in writing and provide notice to:

(1) The ACSIM, through the IMA, NGB or applicable MACOM;

(2) The SHPO;

(3) The Council;

(4) The head of any Federally recognized Indian Tribe or Native Hawaiian organization that attaches traditional religious and cultural importance to any historic property on the installation or affected by installation activities; and,

(5) The THPO for any Federally recognized Indian Tribe where historic properties on Tribal land will be affected by installation activities, including those properties of traditional

religious and cultural importance to the Tribe.

(b) Garrison commanders continuing compliance with section 106 of the Act through 36 CFR part 800 may revisit their decision at any time thereafter and comply with these procedures by:

(1) Filing the notice required by section 2.1(a);

(2) Establishing the necessary program elements set forth in section 3.0; and,

(3) Completing the certification process established by section 4.0.

(c) When an Garrison commander operating under a certified HPC decides that the HPC is no longer appropriate, the Garrison commander may terminate the HPC by taking the following actions:

(1) Provide a notice of the Garrison commander's intent to terminate to all consulting parties 45 days prior to the effective date of termination. The notice of intent to terminate should provide a brief explanation for the decision to terminate;

(2) Invite the Council, ACSIM, and consulting parties to provide their views on the proposed termination during the 45-day notification period, and consider those views during the 45-day period. The Garrison commander will only furnish additional notice to consulting parties when a decision to continue operation under the HPC is made; and,

(3) At the end of the 45-day period, revert to compliance with section 106 through 36 CFR part 800.

(d) Garrison commanders who have terminated their HPC may implement these procedures at a later time through the certification process in section 4.3.

## *Section 3.0: Program Elements for Installations Participating in the Alternate Procedures*

### *3.1 Designation of Cultural Resource Manager (CRM) and Coordinator for Native American Affairs*

(a) Each Garrison commander shall designate an installation CRM to coordinate the section 106 responsibilities required under these procedures. The Garrison commander will ensure that the CRM has appropriate knowledge, skills, and professional training and education to carry out installation cultural resources management responsibilities. The CRM shall ensure that all historic properties technical work, including identification and evaluation of historic properties, assessment and treatment of effects, and preparation of HPCs, is conducted by individuals who meet the applicable professional standards defined in section 1.5.

(b) Each Garrison commander shall designate a Coordinator for Native

American Affairs if there are Native American issues. The Garrison commander will ensure that the Coordinator for Native American Affairs has appropriate knowledge, skills, and professional training and education to conduct installation consultation responsibilities with Federally recognized Indian Tribes and Native Hawaiian organizations. The Coordinator for Native American Affairs is responsible for facilitating the government-to-government relationship and, when designated, carry out staff-to-staff consultation responsibilities with Federally recognized Indian Tribes. The Coordinator for Native American Affairs will have access to the Garrison command staff in order to facilitate direct government-to-government consultation.

(c) If the Garrison commander deems it appropriate, he or she will fill the Coordinator for Native American Affairs position with an individual other than the CRM.

### 3.2 Professional Standards for the Development of the HPC

(a) Prior to developing the HPC, the Garrison commander shall ensure that:

(1) The CRM is either qualified under the standards set forth in the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation, and/or has access to technical experts who meet these standards to identify, evaluate, assess effects to, and treat historic properties, and for certification purposes in section 4.0 below; and,

(2) When such expertise is provided by Federally recognized Indian Tribes and Native Hawaiian organizations regarding identification of properties of traditional religious and cultural importance, they need not meet the Secretary of Interior's Standards and Guidelines for Archeology and Historic Preservation.

(b) The Army is responsible for all findings and determinations made by external parties. When an external party prepares a document or study, the Army is responsible for its content and ensuring that it meets applicable standards and guidelines.

### 3.3 Identification of Consulting Parties for HPC Development

(a) Prior to the development of the HPC, the Garrison commander shall:

(1) Identify the SHPO(s) associated with the installation;

(2) Identify the THPO(s) when installation activities may affect historic properties on Tribal lands;

(3) Identify any Federally recognized Indian Tribes who may attach

traditional religious and cultural importance to any historic properties on or off Tribal lands that may be affected by installation activities;

(4) Identify any Native Hawaiian organization that may attach traditional religious and cultural importance to any historic properties that may be affected by installation activities;

(5) In consultation with the SHPO(s), THPO(s), Federally recognized Indian Tribes, and Native Hawaiian organizations, identify other parties that are entitled, or should be invited to be consulting parties, including interested members of the public; and,

(6) Invite consulting parties to participate in the development of the installation's HPC.

(b) Garrison commanders should contact Federally recognized Indian Tribes early to establish a schedule and protocol for conducting consultation on a government-to-government basis for development of the HPC.

### 3.4 Consultation and Coordination for HPC Development

(a) Each Garrison commander shall develop a draft HPC in consultation with the parties identified in section 3.3, above, and, in coordination with appropriate installation staff (including natural resource management; facilities/housing management; range management, testing, training, and operations; master planning; public affairs office; the CRM, the Coordinator for Native American Affairs, and the Staff Judge Advocate).

(b) The Garrison commander shall ensure that all parties participating in consultation are provided adequate documentation early in the process regarding the installation's mission and operations, historic properties under its control, and the installation command structure. The documentation should be provided to consulting parties at least 30 days in advance of the initial consultation meeting to allow for a full review prior to participation in HPC development.

(c) HPC development begins with an initial consultation meeting between installation staff and consulting parties to identify issues that should be addressed in the HPC. Consultation and coordination shall continue throughout HPC development to ensure adequate opportunity for these parties to fully participate in development of the HPC. Installations are encouraged to invite consulting parties to participate in workgroups for drafting the HPC, but, at a minimum, must, provide opportunities for periodic review, and comment on draft work products.

### 3.5 HPC Development

The Garrison commander shall prepare an HPC to include the following:

(a) *Introduction*: This is a description of the installation's past and present mission(s) to include information that describes the types of activities associated with each mission that might have an effect on historic properties. The introduction shall also identify where the CRM position, and, when appropriate, the Coordinator for Native American Affairs position, is located within the installation's organizational structure.

(b) *Planning Level Survey (PLS)*: The PLS, based on review of existing literature, records, and data, identifies the historic properties that are known, or may be expected to be present, on the installation. The PLS shall be updated as necessary to include additional information made available through the identification and evaluation of historic properties. The PLS shall, as appropriate:

(1) Provide locations of known historic properties, including historic properties having traditional religious and cultural importance to Federally recognized Indian Tribes or Native Hawaiian organizations, that have been listed in the National Register, or determined eligible for inclusion in the National Register, and those properties that require evaluation for determination of eligibility for the National Register;

(2) Be constructed in such a way that sensitive site information shall be excluded from the HPC, where distribution might jeopardize either the historic property or the confidentiality concerns of Federally recognized Indian Tribes and Native Hawaiian organizations;

(3) Establish an annual inventory schedule that identifies and prioritizes those areas of the installation that are programmed for undertakings in the next fiscal year to ensure that inventories and analyses of alternatives are completed early in the planning processes for these activities;

(4) Provide locations that have been previously inventoried where no historic properties have been identified;

(5) Provide information on current and projected future conditions of identified historic properties;

(6) Contain or provide reference to existing historic contexts, archeological sensitivity assessments, predictive models, and other relevant reports addressing historic properties on the installation;

(7) Provide a listing of any affiliated Federally recognized Indian Tribes or

Native Hawaiian organizations, other consulting parties and members of the public having an interest in the historic properties associated with the installation.

(c) *Categorized Undertakings*: This section shall include:

(1) A summary of the categories of undertakings that the installation anticipates conducting over the five-year planning period and should serve as the basis for development of standardized treatments, under section 3.5(e), where such activities have the potential to result in effects to historic properties. Categories of undertakings should include maintenance and repair, ground-disturbing activities, renovation, adaptive reuse, rehabilitation, substantial alteration, demolition, disposal through transfer, sale, or lease, and mothballing. This is not a list of individual undertakings;

(2) If available, a list of potential undertakings that the installation has programmed over the five-year planning period; and,

(3) Past and proposed undertakings that should be considered by consulting parties through the HPC's review and monitoring process required by section 3.5(f)(2).

(d) *Categorical Exclusions*: The HPC should include a list of undertakings that are categorically excluded from review. This list of categorical exclusions, developed in consultation with consulting parties, is supplemental to the Army-wide exempt undertakings listed in section 4.5. Final approval of an HPC's categorical exclusions, as provided for in 36 CFR § 800.14(c), will be made by the Council as part of the certification process; however, the Council may terminate a categorical exclusion at the Army's request or when the Council determines that the exclusion no longer meets the criteria of 36 CFR 800.14(c)(1). The Council shall notify the Army 30 days before termination becomes effective.

(e) *Management Goals and Practices*: The purpose of this section is to establish proactive consideration of preservation concerns carried out by management practices that are integrated into day-to-day installation activities to avoid adverse effects to historic properties. This section shall include:

(1) A description of the installation's desired future condition for historic properties over the course of the planning period;

(2) A description of goals for management and preservation of the installation's historic properties to be achieved over the course of the planning period; and,

(3) A list of management practices that can be employed to best meet the desired future condition and stated management goals. These management practices should:

(i) Be comparable with preservation standards and guidelines included in DA PAM 200-4 and the relevant Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation;

(ii) Focus on the major activities of an installation, including those identified in the Categorized Undertakings section of the HPC; and,

(iii) Focus on standardizing effective historic preservation practices and procedures for installation properties that, at a minimum, include preservation, adaptive reuse, rehabilitation standards, and, as appropriate, interpretation for historic properties.

(f) *Standard Operating Procedures (SOPs)*: SOPs are critical to an installation's proper management of its undertakings and must be developed in close consultation with consulting parties, including SHPOs, THPOs, Federally recognized Indian Tribes, and Native Hawaiian organizations. SOPs shall be developed to provide consistent implementation of management goals, historic preservation standards, coordination, consultation, and mitigation procedures for historic properties that may be affected by installation undertakings. Where Federally recognized Indian Tribes attach traditional religious and cultural importance to historic properties, consultation with Tribes may take place for properties both on and off Tribal lands. These procedures shall be tailored for the particular conditions and specific requirements at an installation. At a minimum, HPCs shall include the following:

(1) *SOPs for Installation Decision Making Process*: These SOPs define the progressive steps which an installation shall take in its internal decision making process in order to manage its undertakings and their potential to affect historic properties. The goal of this SOP should be to avoid adverse effects in the first instance; to mitigate such effects where avoidance is not feasible; and to proceed with notification when adverse effects cannot be mitigated. In order to document this process, a Garrison commander should complete each step of the process before proceeding to the next.

(i) *Identifying Undertakings and Defining APEs*: This SOP shall provide for identifying undertakings and defining the APE for each undertaking.

(ii) *Identifying and Evaluating Historic Properties*: This SOP shall contain procedures for identifying historic properties within the APE, evaluating their eligibility for the National Register and assessing the effects on them, including those properties having traditional religious and cultural importance to Federally recognized Indian Tribes or Native Hawaiian organizations (recognizing that such properties may be eligible under any of the National Register criteria). This SOP should also contain a procedure for resolving any disputes over the eligibility of a property to the National Register. Any unresolved disputes concerning eligibility shall be forwarded to the Keeper of the National Register in accordance with 36 CFR part 63.

(iii) *Applying Best Management Practices*: This SOP shall provide for the consideration and application of historic preservation management practices established pursuant to section 3.5(e) to avoid adverse effects in the first instance and to meet identified HPC preservation goals. Avoidance of adverse effects would preclude the need to proceed with a more detailed alternatives review. Avoidance of adverse effects includes, for example, rehabilitating historic buildings following the Secretary of the Interior's Standards for the Treatment of Historic Properties (1995), and modifying project plans to physically avoid and protect archeological sites and historic properties of traditional religious and cultural importance to a Federally recognized Indian Tribe or Native Hawaiian organization.

(iv) *Alternatives Review*: This SOP shall provide a process for the review of project alternatives for undertakings where application of best management practices is not feasible or would not avoid adverse effects. Prior to applying mitigation measures to minimize unavoidable adverse effects to historic properties, application of this SOP is required. This SOP will:

(A) Conduct a review of project alternatives, using the NEPA process, when practical, to consider whether other feasible alternatives to avoid or reduce impacts to a historic property can be implemented. Alternatives should include the relocation or modification of project features, or the rehabilitation, renovation, adaptive reuse, transfer, or mothballing of historic buildings; and,

(B) Conduct an economic analysis for historic buildings proposed for demolition that addresses and compares the economic costs associated with alternatives, including the life-cycle

costs associated with rehabilitation and reuse; demolition and new construction; and mothballing and reuse.

(v) *Treatment of Adverse Effects:* This SOP shall provide for treating/mitigating adverse effects that cannot be avoided through the application of best management practices or implementation of a project alternative. This SOP should include HABS/HAER recordation, archeological data recovery, and mitigation procedures for transfer, sale or lease of historic properties out of Army ownership to a non-federal entity.

(vi) *Documenting Acceptable Loss:* This SOP shall provide for determinations to proceed with an undertaking having an adverse effect where the Garrison commander has determined that treatment/mitigation is not in the best public interest or is not financially or otherwise feasible. The Garrison commander's determination, including a discussion as to how the preceding steps in the decision making process were carried out and a rationale as to why mitigation measures will not be applied, shall be provided to consulting parties and the Council for a 30-day review, prior to implementing the undertaking. Upon receiving the written views of the Council, the Garrison commander must consider the Council's comments and provide written documentation of his or her decision to the Council and the consulting parties.

(2) *Review and Monitoring:* This SOP shall establish an annual review and monitoring coordination process among appropriate installation staff and consulting parties. Review and monitoring shall:

(i) Provide in advance, sufficient information to allow meaningful participation of consulting parties in the review and monitoring process;

(ii) Include review of the installation's programmed undertakings for the upcoming fiscal year to provide consulting parties an advanced opportunity to express their views on specific methods for identification, evaluation, and treatment of historic properties affected by such undertakings;

(iii) Include evaluation of past undertakings for the concluded fiscal year and the results of historic preservation efforts related to those undertakings;

(iv) Include evaluation of the effectiveness of the installation's HPC and the need to make amendments to it; and,

(v) Rely to the greatest extent practicable, on information generated by existing Army auditing, programming, and reporting systems.

(3) *Obtaining Technical Assistance in HPC Implementation:* Recognizing the importance of consulting parties' expertise in the management of historic properties, this SOP may be used to establish a process for the continued involvement of consulting parties and qualified organizations with a demonstrated interest in management of the installation's historic properties during HPC implementation through use of reimbursable arrangements.

(i) This SOP should establish reimbursable arrangements, such as cooperative agreements and procurement contracts, to obtain technical assistance from SHPOs, THPOs, Federally Recognized Indian Tribes, Native Hawaiian organizations, and other qualified organizations with a demonstrated interest in management of the installation's historic properties.

(ii) This SOP will ensure that the installation obtains necessary technical assistance in identification, evaluation, assessment of effects, and treatment of historic properties, using, to the maximum extent practicable, reimbursable arrangements such as procurement contracts and cooperative agreements with consulting parties and qualified organizations with a demonstrated interest in management of the installation's historic properties.

(iii) This SOP will recognize that:

(A) Federally recognized Indian Tribes are uniquely qualified to identify, evaluate, and treat historic properties to which they attach traditional religious and cultural importance on and off Tribal lands;

(B) Native Hawaiian organizations are uniquely qualified to identify, evaluate, and treat historic properties to which they attach traditional religious and cultural importance; and,

(C) SHPOs and THPOs possess indispensable professional expertise for identification and evaluation of historic properties as well as assessment and treatment of effects.

(iv) This SOP shall ensure that all actions to implement the HPC will be taken by individuals who meet professional standards under regulations established by the Secretary of Interior in accordance with section 112 (a)(1)(A) of the Act. The Army Agency Official shall ensure that professional standards, as defined in section 1.5 of these procedures, are met in the conduct of identification, evaluation, and assessment of effects and treatment of historic properties. When the Army requests assistance from Federally recognized Indian Tribes and Native Hawaiian organizations in the identification, evaluation, assessment of effects and treatment of

historic properties of traditional religious and cultural importance, they need not meet the Secretary of Interior's Professional Qualifications Standards.

(4) *Consultation for Inadvertent Discovery and for Emergency Actions:* This SOP shall establish an expeditious consultation process between the installation and the consulting parties for emergency actions and for the inadvertent discovery of historic properties, including those of traditional religious and cultural importance to Federally recognized Indian Tribes or Native Hawaiian organizations.

Consultation with Federally recognized Indian Tribes shall take place for such properties both on and off Tribal lands.

(5) *Categorical Exclusions:* This SOP shall provide for a process to determine when an approved categorical exclusion is applicable to an undertaking.

(6) *National Historic Landmarks:* This SOP shall contain provisions to give special consideration to installation undertakings that may directly and adversely affect NHLs by taking such planning and actions, where feasible, to minimize harm to the NHL. This SOP shall afford the Council and the National Park Service a reasonable opportunity to comment on the NEPA document(s) prepared for or associated with the undertaking prior to its approval.

(7) *Shared Public Data:* This SOP shall provide for the sharing of data between the installation and consulting parties and the public.

The procedure should, at a minimum, identify the categories of data to be shared, the format in which the data will be provided and the standards of data accuracy that will be met. To the greatest extent permitted by law, including section 304 of the Act and section 9 of ARPA, this SOP shall also ensure that shared data concerning the precise location and nature of historic properties, properties of traditional religious and cultural importance, and sacred sites identified pursuant to Executive Order 13007 are protected from public disclosure through NEPA or the Freedom of Information Act. Particular care should be taken to safeguard electronic data.

#### *Section 4.0: Program Review and Certification*

The Garrison commander shall develop a final HPC only after completing internal Army review and consultation with consulting parties and public participation in accordance with the procedures set forth in this section. The Garrison commander shall sign and implement the final HPC in recognition of its status as a section 106 legal

compliance document. Should the Garrison commander change during HPC implementation, the CRM or Native American Affairs Coordinator, shall advise the incoming Garrison commander of the HPC, its content, commitments and legal effect.

#### 4.1 Army Program Review

(a) Garrison commanders complying with these procedures in lieu of 36 CFR part 800 shall forward a Draft HPC, meeting the requirements set forth in section 3.0, through the IMA, NGB or applicable MACOM to the ACSIM for review and comment through the following procedures.

(b) The Garrison commander shall forward the Draft HPC and supporting documentation that will include:

(1) The Draft HPC addressing all program elements set forth in section 3.0;

(2) The Draft NEPA document, generally an EA, developed to consider the environmental impacts of adopting and developing the Draft HPC;

(3) Confirmation that relevant installation level staff, including legal, operations and training, facilities and public works, have reviewed the Draft HPC;

(4) Summary of consultation with consulting parties and the results of such consultation, including the written comments, if any; and,

(5) An explanation of outstanding issues of concern when the Draft HPC does not reflect the mutual agreement of the installation and consulting parties.

(c) The IMA, NGB or applicable MACOM shall transmit the review package and any comments they may have to the ACSIM within 30 days.

(d) The ACSIM shall conduct Army staff review of the Draft HPC and supporting documentation and provide the Army staff review comments, or endorsement, of the draft HPC through the IMA, NGB or applicable MACOM to the Garrison commander regarding the Draft HPC's consistency with Army technical, legal and policy practices.

(e) The Garrison commander shall release the Draft HPC and NEPA document for review by the public and consulting parties in accordance with the procedures set forth in section 4.2 after receiving ACSIM endorsement. The Garrison commander shall withhold sensitive site data to the greatest extent permitted by ARPA and the Act.

#### 4.2 Consulting Party and Public Review

(a) *Public Review.* After consultation with consulting parties in accordance with section 3.4, and internal Army

program review pursuant to section 4.1, the installation shall release the Draft HPC and NEPA document, including, if appropriate, a draft Finding of No Significant Impact to the public for 30-day review and comment. The installation shall publicize the availability of these documents using appropriate public notification procedures established by the Army's published NEPA regulations, 32 CFR part 651. In addition, the installation shall forward copies of the Draft HPC and Draft NEPA document to any members of the public who have been identified as having an interest in the effects of Army activities on historic properties located on the installation or affected by installation activities, and local government officials.

(b) *Tribal, Native Hawaiian organization, SHPO, THPO and Council Review:*

(1) Concurrent with public review, the Garrison commander shall forward the Draft HPC and NEPA document to the following entities and invite their views:

(i) The Council;

(ii) The SHPO;

(iii) The THPO for any Federally recognized Indian Tribe where historic properties on Tribal lands will be affected by installation activities, including those properties of traditional religious and cultural importance to the Tribe;

(iv) The Tribal government and Native Hawaiian organization that attaches traditional religious and cultural importance to any historic property on the installation or affected by installation activities;

(v) any other consulting parties that have taken part in development of the HPC; and,

(2) Within 30 days of receipt of Draft HPC and NEPA document, consulting parties shall:

(i) Provide their written views to the installation;

(ii) Indicate whether or not they intend to be a signatory to the HPC; and,

(iii) Identify specific objections to the HPC.

(3) If any consulting party fails to provide written response within the 30-day review period, the Garrison commander may presume there is no objection by that consulting party to the Draft HPC.

(4) Garrison commanders shall consider the comments from the public and the written views and recommendations of the Council, SHPO, THPO, Tribal government or Native Hawaiian organization, and make adjustments to the Draft HPC and NEPA document, if appropriate.

(5) Where a SHPO, THPO, Tribal government or Native Hawaiian organization has objected in writing to the Draft HPC and refused to be a signatory, Garrison commanders shall consult with the objecting party to resolve the objection, prior to forwarding the Draft HPC and supporting documentation to the Council for review and certification.

#### 4.3 Council Review and Certification

(a) After considering, and where appropriate, addressing the views of other consulting parties and the public, and consulting to resolve objections, the Garrison Commander shall sign the final HPC. The Garrison Commander shall then obtain the signature of consulting parties (other than those with outstanding objections), and forward the signed HPC to the Council with a request to review and certify the installation's HPC. The following supporting documentation will be included:

(1) Final NEPA documentation,

(2) Written views, if any, of consulting parties, including SHPO, THPO, Tribal governments or Native Hawaiian organizations,

(3) Summary of consultation with consulting parties, including SHPO, THPO, Tribal governments or Native Hawaiian organization(s),

(4) Any views expressed by the public; and,

(5) Where a consulting party has declined to participate as a signatory to the HPC, a summary of the party's objections and the installation's efforts to resolve the objections.

(b) The Council shall review the HPC to determine whether it meets the following certification criteria:

(1) Establish the Program Elements set forth in section 3.0;

(2) Include appropriate SOPs to ensure that the installation will effectively manage its historic properties, identify and consider the effects of its undertakings on historic properties, including those of traditional religious and cultural importance to a Federally recognized Indian Tribe or Native Hawaiian organization, apply appropriate treatment standards, and coordinate and consult with consulting parties;

(3) Demonstrate that it was developed in consultation with the SHPO, THPO, Tribal governments or Native Hawaiian organizations that attach traditional religious and cultural importance to historic properties on the installation or affected by installation activities;

(4) Demonstrate that the public participated in development and/or review;

(5) Establish procedures for coordination to facilitate review and monitoring;

(6) Establish procedures for obtaining Council and National Park Service comments through the NEPA process where an undertaking will have a direct and adverse effect on an NHL; and,

(7) For installations with identified NHLs, establish procedures, where feasible, for minimizing the effects of undertakings that may have a direct and adverse effect on an NHL.

(c) Within 30 days of its receipt of the HPC and supporting documentation, the Council shall apply the certification criteria set forth in section 4.3(b)(1)–(7), and shall:

(1) Determine that the installation's HPC meets the criteria and sign the HPC, certifying the installation to comply with section 106 of the Act through implementation of the HPC. Within 30 days of receiving the Council's certification, the Garrison commander shall provide signed copies of the certified HPC to consulting parties; or,

(2) Determine that the installation historic preservation program shall meet the certification criteria with minor adjustments; and,

(i) Provide views to the installation with suggested changes, and,

(ii) Sign the HPC, subject to the installation's incorporation of changes, certifying the installation to comply with section 106 of the Act through implementation of the HPC. Within 60 days of receipt of the Council's certification, the Garrison commander, unless an extension period is agreed to, shall make the recommended changes and shall provide copies of the revised HPC to the Council, and the consulting parties. If the Council does not receive the installation changes within 60 days or the extension period, the Council shall notify the Garrison commander and consulting parties that the HPC has failed to meet certification criteria, and the installation shall follow section 4.3(d), below.

(3) Determine that the installation has failed to meet one or more of the certification criteria set forth in section 4.3(b)(1)–(7), and:

(i) Provide the installation with formal written views that identify the specific criterion and related deficiency; and,

(ii) Make specific recommendations to the installation for addressing the identified deficiency.

(d) Where the Council has determined that the installation's HPC has failed to meet the certification criteria, the Garrison commander shall:

(1) Address the identified deficiency and resubmit the HPC and supporting documentation to the Council for certification in accordance with section 4.3(a), in which case the Council shall conduct the review and provide a certification determination pursuant to section 4.3(b)–(c); or,

(2) Object, in writing, to the Council's recommendations and consult with the Council to resolve the objections.

(i) If, after good faith consultation, the Council and Garrison commander agree that the objection(s) cannot be resolved, the installation shall notify the ACSIM through the IMA, NGB or applicable MACOM.

(ii) If, 30 days after ACSIM notification, objections remain unresolved, consultation under these procedures shall terminate and the Garrison commander will notify consulting parties and continue to operate under 36 CFR part 800.

(3) The Garrison commander may resubmit his request for certification and reinitiate consultation at any time after termination.

#### 4.4 Effect of Certification

(a) Installations with a certified HPC shall operate under the procedures set forth herein as implemented by that HPC. The provisions of the certified HPC shall substitute for the requirements of 36 CFR part 800 for a period of five years from the date of certification.

(b) Installations applying these procedures that have not met certification requirements shall review undertakings in accordance with the procedures set forth in 36 CFR part 800.

(c) Installations shall implement treatment and mitigation commitments made in existing project-specific Memoranda of Agreement (MOAs) and Programmatic Agreements (PAs). Upon completion of pre-existing mitigation and treatment requirements, such agreements shall terminate. Requirements of other installation level Programmatic Agreements shall terminate upon certification. However, successful procedures in such agreements for the identification, evaluation, assessment of effects and treatment of historic properties should be considered during consultation, and if appropriate, integrated in the SOPs.

#### 4.5 Exempt Undertakings

(a) The following categories of undertakings are exempt from further review by an installation operating under a certified HPC:

(1) Undertakings addressed through a fully executed nationwide Programmatic Agreement or other

Program Alternative executed in accordance with 36 CFR part 800.14.

(2) Undertakings categorically excluded by an installation's HPC pursuant to section 3.5(d).

(3) Undertakings where there is an imminent threat to human health and safety. Such actions include:

(i) In-place disposal of unexploded ordnance;

(ii) Disposal of ordnance in existing open burning/open detonation units;

(iii) Emergency response to releases of hazardous substances, pollutants and contaminants; and,

(iv) Military training and testing activities in existing designated surface danger zones (e.g. duded impact areas).

(b) Where a Federally recognized Indian Tribe has entered into an agreement with the Council to substitute Tribal historic preservation regulations for the Council's regulations under section 101(d)(5) of the Act, the Army shall follow those Tribal historic preservation regulations for undertakings occurring on or affecting historic properties on Tribal lands.

(c) In instances where another Federal agency is involved with the Army in an undertaking, the Army and the other agency may mutually agree that the other agency be designated as lead Federal agency. In such cases, undertakings will be reviewed in accordance with 36 CFR part 800.

#### Section 5.0: Amendment and Recertification

##### 5.1 Plan Amendment

(a) At any time after obtaining Council certification, a consulting party may identify changed circumstances and propose an HPC amendment to the Garrison commander.

(b) If the Garrison commander determines that an amendment to an HPC may be necessary, the installation shall continue to review undertakings and treat adverse effects in accordance with the established HPC, unless he/she determines that the HPC is insufficient to meet its responsibilities under section 106 of the Act. If the Garrison commander determines that the HPC is no longer sufficient to meet those responsibilities, it shall review its undertakings in accordance with 36 CFR part 800 until the proposed HPC amendment is completed.

(c) Where the Garrison commander determines that an amendment proposed by a consulting party is not necessary, and agreement cannot be reached between the Garrison commander and the consulting party to amend the HPC, the consulting party may request Council review under section 7.2.

(d) *Major Amendments*: Any proposal to alter, delete, or add to an HPC's list of categorical exclusions, best management practices, or established standard operating procedures shall be considered a Major Amendment to the HPC.

(1) The Garrison commander shall:

(i) Forward the proposed amendment to consulting parties;

(ii) Consult with such parties and invite them to be signatories on the HPC Major Amendment; and,

(iii) Seek and consider views of the public through the NEPA process, if applicable.

(2) Within 45 days of its receipt of the proposed HPC Major Amendment, each consulting party shall:

(i) Provide written comments to the installation;

(ii) Indicate whether it intends to be a signatory to the proposed HPC Major Amendment; and, if not,

(iii) Provide written objections to both the Garrison commander and the Council.

(3) When a consulting party fails to provide written response within the 45-day review period, the Garrison commander may presume that there is no objection to the proposed HPC Major Amendment by that consulting party.

(4) If all consulting parties and the Garrison commander concur with the proposed HPC Major Amendment, the Garrison commander shall obtain the consulting parties signatures on the final HPC major amendment and forward it to the Council for review, approval, and signature. If the Council does not respond within 30 days of its receipt of the amendment, then the amendment shall be considered final. The Garrison commander shall send copies of the final signed HPC Major Amendment to consulting parties and the ACSIM through the IMA, NGB or applicable MACOM.

(5) If all consulting parties do not concur with the proposed HPC Major Amendment and/or the Council objects within 30 days of the proposed amendment, the Council shall provide its written views and recommendations on the proposed HPC Major Amendment to the Garrison commander;

(i) If the Garrison commander considers the Council's views and implements the Council's recommendations, then the HPC Major Amendment shall be considered final.

(ii) If the Garrison commander objects to the Council's recommendations, the Garrison commander shall consult with the Council to resolve the objections.

(A) If the Council and the Garrison commander agree that the objection

cannot be resolved, installation shall notify the ACSIM through the IMA, NGB or applicable MACOM.

(B) If, 30 days after ACSIM notification, objections remain unresolved, consultation shall terminate and the installation shall either continue implementation of its certified HPC without the amendment or, where that is not feasible, comply with 36 CFR part 800. The Garrison commander shall notify consulting parties of the final decision.

(iii) The Garrison commander may reinstate consultation on the proposed amendment to the HPC any time after termination.

(e) *Minor Amendments*: When circumstances at an installation change, requiring Minor Amendment(s) to an administrative provision in the installation's HPC, such as identification of the CRM, Coordinator for Native American Affairs, changes to the planning level survey, changes to the list of categorized undertakings, and technical editorial changes, the Garrison commander shall:

(1) Amend the HPC without further consultation or coordination; and,

(2) Provide a Notice of Change to consulting parties and the Council.

## 5.2 Recertification

(a) No later than six months prior to expiration of the five-year term of certification, the Garrison commander shall initiate the process for obtaining renewed certification through the procedures set forth in sections 3.0 and 4.0 of these procedures.

(b) The installation shall continue to operate under its certified HPC during the recertification process unless the five-year term of the HPC has expired. Where the five-year term of the HPC has expired, the Garrison commander shall:

(1) Continue to operate under the certified HPC for a period of time to be determined by the Council, in consultation with the Garrison commander; and,

(2) Inform consulting parties of the time extension, and work with them towards completing the recertification process; or,

(3) Inform consulting parties and review individual undertakings in accordance with 36 CFR part 800 until recertification of the HPC is completed.

## Section 6.0: Administrative Remedies

### 6.1 Evaluation of Council Determinations

(a) Within 30 days of the Council's final determination to certify or recertify an installation to operate under its HPC, or approve a Major Amendment, a

consulting party may object in writing to the Council's determination. The objection must:

(1) Be forwarded to the Council, and the Garrison commander;

(2) Be specifically related to a deficiency in:

(i) Consultation with the consulting party; and/or,

(ii) Consideration of historic properties of importance to that objecting party.

(b) The Council shall review the objection, obtain the installation's views, and within 30 days provide the Council's written determination to both the objecting party and the Garrison commander.

(c) The Council's written determination shall either:

(1) Validate the Council's previous determination to certify or recertify the HPC, or to approve a Major Amendment;

(2) Allow the installation to continue implementation while resolving objections; or,

(3) Revoke the previous determination and require the installation to review its undertakings in accordance with 36 CFR part 800.

### 6.2 Evaluation of HPC Implementation

(a) Any time subsequent to Council certification or recertification, if a consulting party believes that an installation has failed to implement its HPC, the consulting party shall first notify the Garrison commander, in writing, of its objection. The consulting party must provide information and documentation sufficient to set forth the basis for its objection. The Garrison commander and consulting party shall attempt to resolve the objection informally before proceeding with the formal procedures set forth below.

(b) If a consulting party has raised an objection with the Garrison commander and the objection has not been resolved informally, the objecting party may elevate its objection to the Council, in writing. The written objection must:

(1) Be forwarded to the Council and the Garrison commander;

(2) Be specifically related to an installation's failure to implement an identified SOP in the HPC; and,

(3) Describe the objecting party's efforts to resolve the objection informally at the installation level.

(c) Where the consulting party has objected to a specific undertaking, the Garrison commander shall, during the 15-day Council review period set forth below, defer that discrete portion of the undertaking which may cause adverse effects to historic properties. This deferral provision will not apply where

the activity at issue is an exempt undertaking under section 4.5 or where the adverse effects have been documented as acceptable loss under an installation's HPC implementing section 3.5(f)(1)(vi) of these procedures.

(d) The Council, within 15 days of receiving the written objection of a consulting party, shall provide a written response to the consulting party and the Garrison commander, expressing its views, and, if appropriate, making specific recommendations for resolution of the consulting party's objections.

(e) If the Council does not provide its written views within the 15-day review period, the Garrison commander shall assume that there is no Council objection and proceed with the undertaking.

(f) If the Council does provide its written views within the 15-day review period, the Garrison commander shall document Army consideration of the Council's views, provide copies of the documentation to the Council and the objecting consulting party, and proceed with the undertaking.

(g) The Council may also object to an installation's implementation of its HPC, in which case the Council will provide its written views and specific recommendations for resolution to the Garrison commander for his or her consideration. The Garrison commander shall document Army consideration of the Council's views, and provide copies of the documentation to the Council and the consulting parties.

#### *Section 7.0: Council Review of Army Section 106 Compliance*

##### **7.1 Council Review of Army Alternate Procedures**

(a) The Council may periodically evaluate the effectiveness of these procedures in meeting the mandates, goals and objectives of section 106 of the Act and make recommendations to the Army to improve the efficiency and effectiveness of its compliance with section 106, under these procedures.

(b) As required by section 203 of the Act, the Army shall assist the Council in their evaluation by providing requested documentation on Army policies, procedures, and actions taken to comply with section 106 of the Act.

(c) The Council shall make the results of any evaluation conducted under this section available for public inspection.

(d) Upon request by Headquarters, Department of the Army, the Council may adopt technical and/or administrative amendments to the Army Alternate Procedures. Such amendments will take effect upon approval by the Council's Chairman.

The Council shall publish in the **Federal Register** a notice of such amendment within 30 days after their approval. Technical and administrative amendments shall not modify the role of consulting parties in the Army Alternate Procedures.

##### **7.2 Council Review of Installation Compliance**

(a) The Council may review an installation's compliance with its HPC only where a documented pattern of failure to implement the installation's HPC is evident. The Council's review may be undertaken on its own initiative or at the request of a consulting party based in part on the objections rising from evaluation under section 6.2. Based on its review, the Council shall:

(1) Determine that the installation is substantially complying with the HPC and make recommendations for program improvements; or,

(2) Initiate consultation with the Garrison commander, and recommend a course of action to ensure installation implementation of its HPC.

(3) Provide a copy of any written recommendations to consulting parties.

(b) The Garrison commander, after receiving Council recommendations, shall either:

(1) Conclude consultation and implement its HPC in accordance with Council recommendations; or, (2) Obtain ACSIM endorsement to revert to operation under 36 CFR part 800 and provide notice to consulting parties and the Council.

#### **Appendix A: Acronyms**

##### **Acronyms Used in Army Alternate Procedures for Historic Properties**

AAP Army Alternate Procedures  
 ACSIM Assistant Chief of Staff for Installation Management  
 AR 200-2 Army Regulation 200-2:  
 Environmental Effects of Army Actions  
 Act The National Historic Preservation Act  
 APE Area of Potential Effects  
 ARPA The Archeological Resources Protection Act  
 CRM Cultural Resources Manager  
 DA PAM 200-4 Department of the Army Pamphlet 200-4: Cultural Resources Management  
 DEP Director of Environmental Programs  
 EA Environmental Assessment  
 EIS Environmental Impact Statement  
 FPO Federal Preservation Officer  
 HPC Historic Properties Component (the section 106 portion of an ICRMP)  
 HQDA Headquarters, Department of the Army  
 ICRMP Integrated Cultural Resources Management Plan  
 IMA Installation Management Agency  
 MACOM Major Command  
 MOA Memorandum of Agreement  
 NAGPRA The Native American Graves

Protection and Repatriation Act  
 NEPA The National Environmental Policy Act

NGB National Guard Bureau

NHL National Historic Landmark

NHPA The National Historic Preservation Act

PA Programmatic Agreement

PLS Planning Level Survey

SHPO State Historic Preservation Officer

SOP Standard Operating Procedure

THPO Tribal Historic Preservation Officer

**Authority:** 16 U.S.C. 470s; 36 CFR 800.14(a).

Dated: April 13, 2004.

**John M. Fowler,**

*Executive Director.*

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**BILLING CODE 4310-10-P**

## **DEPARTMENT OF AGRICULTURE**

### **Office of the Secretary**

#### **Notice of the Research, Education, and Economics Task Force Meeting**

**AGENCY:** Research, Education, and Economics, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** In accordance with the Federal Advisory Committee Act, 5 U.S.C. App., the United States Department of Agriculture announces a meeting of the Research, Education, and Economics Task Force.

**DATES:** The Research, Education, and Economics Task Force will meet on April 20, 2004. The public may file written comments before or up to two weeks after the meeting with the contact person.

**ADDRESSES:** On April 20th, the meeting will take place at the Lowes L'Enfant Plaza Hotel, 480 L'Enfant Plaza, SW., Washington, DC, 20024.

Written comments from the public may be sent to the Contact Person identified in this notice at: The Research, Education, and Economics Task Force; Office of the Under Secretary, Room 214-W, Jamie L. Whitten Building, United States Department of Agriculture, 1400 Independence Ave., SW., Washington, DC 20250.

**FOR FURTHER INFORMATION CONTACT:** Kathryn Boots, Executive Director, Research, Education, and Economics Task Force; telephone: (202) 690-0826; fax: (202) 690-2842; or e-mail: [katie.boots@usda.gov](mailto:katie.boots@usda.gov).

**SUPPLEMENTARY INFORMATION:** On Tuesday, April 20th, the Research, Education, and Economics Task Force will hold a general meeting at the Lowes L'Enfant Plaza Hotel. The Task Force

will continue its evaluation of the merits of establishing one or more National Institutes focused on disciplines important to the progress of food and Agricultural science. In the morning there will be welcoming remarks made by the Chairman of the Task Force, Dr. William Danforth, Chancellor Emeritus, Vice Chairman, Board of Trustees, Washington University in St. Louis, and USDA Deputy Under Secretary for Research, Education, and Economics (REE), Dr. Rodney J. Brown. Welcoming remarks will be followed by a review and editing of the draft report. There will be a working lunch followed by an afternoon discussion of plans and the timetable for completing and approving the final report.

The Task Force Meeting will adjourn on Tuesday, April 20th, around 4 p.m. This meeting is open to the public. Due to a delay, this notice could not be published at least 15 days prior to the meeting. The meeting will be held as scheduled because of the significant sacrifice rescheduling would require of the Task Force members who have adjusted their schedules to accommodate the proposed meeting date. Written comments for the public record will be welcomed before and up to two weeks following the Task Force meeting (by close of business Tuesday, May 4th, 2004). All statements will become part of the official record of the Research, Education, and Economics Task Force and will be kept on file for public review in the Office of the Under Secretary for Research, Education, and Economics.

Done at Washington, DC this 13th day of April 2004.

**Rodney J. Brown,**

*Deputy Under Secretary, Research, Education, and Economics.*

[FR Doc. 04-8835 Filed 4-15-04; 8:45 am]

**BILLING CODE 3410-03-U**

## DEPARTMENT OF AGRICULTURE

### Farm Service Agency

#### **Request for Revision and Extension of a Currently Approved Information Collection; Management Advice to Individual Borrowers and Applicants**

**AGENCY:** Farm Service Agency, USDA.

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice announces the intent of the Farm Service Agency (FSA) to request an extension and revision of the Office of

Management and Budget's (OMB) approval of the information collection which supports the FSA, Farm Loan Programs (FLP) loan making and servicing applications. This renewal does not involve any revisions to the program regulations.

**DATES:** Comments on this notice must be received on or before June 15, 2004, to be assured of consideration.

**FOR FURTHER INFORMATION CONTACT:** Gail Wargo, Senior Loan Officer, USDA, FSA, Farm Loan Programs, Program Development and Economic Enhancement Division, 1400 Independence Avenue, SW., STOP 0521, Washington, DC 20250-0521; telephone (202) 720-3647; electronic mail: [gail.wargo@wdc.usda.gov](mailto:gail.wargo@wdc.usda.gov).

**SUPPLEMENTARY INFORMATION:** *Title:* Management Advice to Individual Borrowers and Applicants.

*OMB Control Number:* 0560-0154.

*Expiration Date of Approval:* September 30, 2004.

*Type of Request:* Extension and revision of a currently approved information collection.

*Abstract:* The information collected under OMB Control Number 0560-0154 is necessary to provide proper farm assessments, credit counseling and supervision to direct loan borrowers in accordance with the requirements of 7 CFR part 1924, subpart B as authorized by the Consolidated Farm and Rural Development Act. Specifically, the Agency uses the information to protect the government's financial interests by ensuring that the farming operations of direct loan applicants and borrowers are properly assessed for short and long-term financial feasibility. The information is needed by the Agency to assure that the recipients of direct loans receive appropriate credit counseling and supervision to ensure the greatest chance for financial success.

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average 2.50 hours per response.

*Respondents:* Individuals or households, businesses or other for profit and farms.

*Estimated Number of Respondents:* 55,542.

*Estimated Number of Responses per Respondent:* 1.00.

*Estimated Total Annual Burden on Respondents:* 143,059.

Comments are sought on these requirements including: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the

agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; or (d) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical or other technological collections techniques or other forms of information technology.

These comments should be sent to the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 and to Gail Wargo, USDA, FSA, Farm Loan Programs, Program Development and Economic Enhancement Division, 1400 Independence Avenue, SW., STOP 0521, Washington, DC 20250-0521. Copies of the information collection may be obtained from Gail Wargo at the above address. Comments regarding paperwork burden will be summarized and included in the request for OMB approval of the information collection. All comments will also become a matter of public record.

Signed in Washington, DC, on April 7, 2004.

**Verle E. Lanier,**

*Acting Administrator, Farm Service Agency.*

[FR Doc. 04-8615 Filed 4-15-04; 8:45 am]

**BILLING CODE 3410-05-P**

## DEPARTMENT OF AGRICULTURE

### Farm Service Agency

#### **Notice of Funds Availability: Tree Assistance Program for New York Fruit Tree Losses Due to Ice Storm**

**AGENCY:** Farm Service Agency, USDA.

**ACTION:** Notice.

**SUMMARY:** This notice announces the availability of \$5,000,000 to provide assistance under the Tree Assistance Program (TAP) to compensate tree-fruit growers in a federally-declared disaster area in the State of New York who suffered tree losses in 2003 as the result of an April 4-6, 2003, ice storm.

**DATES:** Applications by eligible persons may be submitted any time before the ending date announced by the Deputy Administrator for Farm Programs, Farm Service Agency. That date, unless adjusted by the Deputy Administrator, shall be May 14, 2004.

**FOR FURTHER INFORMATION CONTACT:** Eloise Taylor, Chief, Compliance Branch, Production, Emergencies and Compliance Divisions, FSA/USDA, Stop 0517, 1400 Independence Avenue SW.,

Washington, DC 20250-0517; telephone (202) 720-9882; e-mail:

*Eloise.Taylor@wdc.usda.gov*. Persons with disabilities who require alternative means for communication of regulatory information, (Braille, large print, audiotape, etc.), should contact USDA's TARGET Center at (202) 720-2600 (voice and TDD).

#### SUPPLEMENTARY INFORMATION:

##### Background

TAP was authorized, but not funded, by section 10201 *et seq.* of the Farm Security and Rural Investment Act of 2002 (Pub. L. 107-171) (7 U.S.C. 8201 *et seq.*) to provide assistance to eligible orchardists to replant trees, bushes and vines that were grown for the production of an annual crop and were lost due to a natural disaster. This notice sets out a special program within TAP for certain fruit tree losses due to an ice storm in New York. Section 756(a) of Division A of the Consolidated Appropriations Act, 2004 (Pub. L. 108-199) provided that the Secretary of Agriculture shall use \$5,000,000 of the funds of the Commodity Credit Corporation to provide assistance under TAP to compensate tree-fruit growers in a federally-declared disaster area in the State of New York who suffered tree losses in 2003 as the result of an April 4-6, 2003, ice storm. Assistance will be provided subject to regulations and restrictions governing the TAP provided for in the 2002 Act. Those regulations were published March 2, 2004 (69 FR 9744) and are found at 7 CFR part 783. Also, the restrictions of the statute apply. Those include a requirement of replanting, a limitation on payments by "person," a limitation on acres for which relief can be claimed, a requirement that the loss be tied to a natural disaster, and others. If, after the claims filed during the allowed period set out in this notice are received and the available funds are less than the eligible claims, a proration will be made. Claims are limited to the lesser of the established practice rates or 75 percent of the actual costs for eligible replantings after adjusting for normal mortality. In addition, the reimbursement for those plantings cannot exceed the reasonable cost of those replantings as determined by FSA. There are other statutory restrictions. Under current law, no "person" as defined by reference to program regulations can receive, cumulatively, for all TAP claims for all commodities over the life of the program as administered pursuant to the general authority of the 2002 Act, a total of \$75,000. Also, and cumulatively, no

person, for all TAP claims for all commodities over the life of the administration of the program, can, under current law, receive benefits for losses on more than 500 acres. All other restrictions of the TAP regulations and statute apply as well. Other requirements may also apply.

##### Applications

Applications may be accepted at any time before the ending date set by the Deputy Administrator for Farm Programs, FSA. That date, unless modified by the Deputy Administrator, shall be May 14, 2004. Only producers with losses in federally-declared disaster counties may file an application. The counties are Cayuga, Chenango, Livingston, Madison, Monroe, Oneida, Onondaga, Ontario, Orleans, Oswego, Otsego, Schenectady, Seneca, Wayne, and Yates.

Application forms are available for TAP at FSA county offices or on the Internet at *www.fsa.usda.gov*. A complete application for TAP benefits and related supporting documentation must be submitted to the county office before the deadline.

A complete application will include all of the following:

- (1) A form provided by FSA;
- (2) A written estimate of the number of fruit trees lost or damaged which is prepared by the owner or someone who is a qualified expert, as determined by the FSA county committee;
- (3) The number of acres on which the loss was suffered;
- (4) Sufficient evidence of the loss to allow the county committee to calculate whether an eligible loss occurred; and
- (5) Other information as requested or required by regulation.

Signed at Washington, DC, on March 25, 2004.

**James R. Little,**

*Administrator, Farm Service Agency.*

[FR Doc. 04-8648 Filed 4-15-04; 8:45 am]

**BILLING CODE 3410-05-P**

#### DEPARTMENT OF AGRICULTURE

##### Forest Service

##### Olympic Peninsula Resource Advisory Committee (RAC)

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The Olympic Peninsula Resource Advisory Committee will hold its next meeting on May 13, 2004. The meeting will be held at Mason County's Public Utility Department auditorium at 307 West Cota Street, Shelton,

Washington. The meeting will begin at 9:30 a.m. and end at approximately 3:30 p.m. The purpose of the meeting is to: Approve minutes of previous meeting; consider modifications to By-laws; review process for making nominations for RAC membership for fiscal years 2005-2007; review status of prior year Title III projects; review status of prior year Title II projects; present project proposals for FY 2005; select projects and priorities to recommend to Designated Federal Official for approval; and receive public comments.

**DATE:** The meeting will be held May 13, 2004 from 9:30 a.m. to 3:30 p.m.

**ADDRESSES:** The meeting will be held in Mason County's Public Utility Department auditorium at 307 West Cota Street, Shelton, Washington.

**FOR FURTHER INFORMATION CONTACT:** Ken Eldredge, RAC Liaison, USDA, Olympic National Forest Headquarters, 1835 Black Lake Blvd., Olympia, WA 98512-5623, (360) 956-2323 or Dale Hom, Forest Supervisor and Designated Federal Official, at (360) 956-2301.

**SUPPLEMENTARY INFORMATION:** All Resource Advisory Committee meetings are open to the public and interested citizens are encouraged to attend. Committee discussion is limited to committee members, Forest Service representatives and project sponsors. However, persons who wish to comment on meeting proceedings and project proposals will be given time during the public comment time. Individuals who would like time on the agenda must sign-in before the start of the meeting, stating they would like to comment. Comments must be brief, less than 5 minutes and to the point.

Dated: April 12, 2004.

**Dale Hom,**

*Forest Supervisor, Olympic National Forest.*

[FR Doc. 04-8642 Filed 4-15-04; 8:45 am]

**BILLING CODE 3410-11-M**

#### DEPARTMENT OF AGRICULTURE

##### Forest Service

##### Grays Harbor Resource Advisory Committee (RAC)

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The Grays Harbor Resource Advisory Committee will hold its next meeting on May 13, 2004. The meeting will be held at Hoquiam Library at 420 Seventh Street, Hoquiam, Washington. The meeting will begin at 6:30 p.m. and end at approximately 8:30 p.m. The purpose of the meeting is to: approve

minutes of previous meeting; consider modifications to Bylaws; review process for making nominations for RAC membership for fiscal years 2005–2007; review status of prior year Title II projects; present project proposals for FY 2005; select projects and priorities to recommend to Designated Federal Official for approval; and receive public comments.

**DATES:** The meeting will be held May 13, 2004 from 6:30 p.m. to 8:30 p.m.

**ADDRESSES:** The meeting will be held at the Hoquiam Library at 420 Seventh Street, Hoquiam, Washington.

**FOR FURTHER INFORMATION CONTACT:** Ken Eldredge, RAC Liaison, USDA, Olympic National Forest Headquarters, 1835 Black Lake Blvd., Olympia, WA 98512–5623, (360) 956–2323 or Dale Hom, Forest Supervisor and Designated Federal Official, at (360) 956–2301.

**SUPPLEMENTARY INFORMATION:** All Resource Advisory Committee meetings are open to the public and interested citizens are encouraged to attend. Committee discussion is limited to committee members, Forest Service representatives and project sponsors. However, persons who wish to comment on meeting proceedings and project proposals will be given time during the public comment time. Individuals who would like time on the agenda must sign-in before the start of the meeting, stating they would like to comment. Comments must be brief, less than 5 minutes and to the point.

Dated: April 12, 2004.

**Dale Hom,**

*Forest Supervisor, Olympic National Forest.*

[FR Doc. 04–8643 Filed 4–15–04; 8:45 am]

**BILLING CODE 3410–11–M**

## COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

### Procurement List; Proposed Additions and Deletions

**AGENCY:** Committee for Purchase from People Who Are Blind or Severely Disabled.

**ACTION:** Proposed Additions to and Deletions from Procurement List.

**SUMMARY:** The Committee is proposing to add to the Procurement List services to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and to delete products previously furnished by such agencies.

*Comments Must Be Received on or Before:* May 16, 2004.

**ADDRESSES:** Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia, 22202–3259.

**FOR FURTHER INFORMATION CONTACT:** Sheryl D. Kennerly, (703) 603–7740.

**SUPPLEMENTARY INFORMATION:** This notice is published pursuant to 41 U.S.C. 47(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

### Additions

If the Committee approves the proposed additions, the entities of the Federal Government identified in this notice for each product or service will be required to procure the services listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

#### Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. If approved, the action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the services to the Government.

2. If approved, the action will result in authorizing small entities to furnish the services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the services proposed for addition to the Procurement List. Comments on this certification are invited. Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

#### End of Certification

The following services are proposed for addition to Procurement List for production by the nonprofit agencies listed:

### Services

**Service Type/Location:** Custodial Services, Federal Building, Courthouse, Raleigh, North Carolina; Federal Building, Post Office, Century Station, Raleigh, North Carolina; Federal Building, Post Office, Courthouse, Elizabeth City, North Carolina; U.S. Courthouse, Greenville, North Carolina.

**NPA:** Orange Enterprises, Inc., Hillsborough, North Carolina.

**Contract Activity:** GSA, Property Management Center (4PMC), Charlotte, North Carolina.

**Service Type/Location:** Janitorial/Grounds and Related Services, Clearfield Federal Depot, Buildings C–6, C–7, D–5 and 2, Clearfield, Utah.

**NPA:** Pioneer Adult Rehabilitation Center Davis County School District, Clearfield, Utah.

**Contract Activity:** GSA/Mountain Plains Service Center, Salt Lake City, Utah.

### Deletions

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. If approved, the action may result in additional reporting, recordkeeping or other compliance requirements for small entities.

2. If approved, the action may result in authorizing small entities to furnish the products to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the products proposed for deletion from the Procurement List.

The following products are proposed for deletion from the Procurement List:

### Products

**Product/NSN:** Cloth, Super Wipe, M.R. 565.

**NPA:** Industries of the Blind, Inc., Greensboro, North Carolina.

**Contract Activity:** Defense Commissary Agency (DeCA), Ft. Lee, Virginia.

**Product/NSN:** Cup, Drinking, Styrofoam, M.R. 537.

**NPA:** The Oklahoma League for the Blind, Oklahoma City, Oklahoma.

**Contract Activity:** Defense Commissary Agency (DeCA), Ft. Lee, Virginia.

**Product/NSN:** Ergonomic Kitchen Gadgets (Ergo Nylon Square Turner), M.R. 880.

**NPA:** Cincinnati Association for the Blind, Cincinnati, Ohio.

**Contract Activity:** Defense Commissary Agency (DeCA), Ft. Lee, Virginia.

**Product/NSN:** Kitchen, Utensils (Spatula, Plate and Bowl), M.R. 832.

**NPA:** Dallas Lighthouse for the Blind, Dallas, Texas.

**Contract Activity:** Defense Commissary Agency (DeCA), Ft. Lee, Virginia.

**Product/NSN:** Mophead, Cotton Yarn, Wet, M.R. 937.

**NPA:** Arizona Industries for the Blind, Phoenix, Arizona.

**NPA:** New York Association for the Blind, Long Island, New York.

**NPA:** Mississippi Industries for the Blind, Jackson, Mississippi.

**Contract Activity:** Defense Commissary Agency (DeCA), Ft. Lee, Virginia.

**Product/NSN:** Scrubber, Pot & Dish and Refill, M.R. 592.

**NPA:** Lighthouse International, New York, New York.

*Contract Activity:* Defense Commissary Agency (DeCA), Ft. Lee, Virginia.

*Product/NSN:* Sponge, Bath, M.R. 593.

*NPA:* Industries for the Blind, Greensboro, North Carolina.

*Contract Activity:* Defense Commissary Agency (DeCA), Ft. Lee, Virginia.

*Product/NSN:* Vegetable Peeler, Stainless Steel, M.R. 825.

*NPA:* Cincinnati Association for the Blind, Cincinnati, Ohio.

*Contract Activity:* Defense Commissary Agency (DeCA), Ft. Lee, Virginia.

**Sheryl D. Kennerly,**

*Director, Information Management.*

[FR Doc. 04-8688 Filed 4-15-04; 8:45 am]

**BILLING CODE 6353-01-P**

## COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

### Procurement List; Additions and Deletions

**AGENCY:** Committee for Purchase from People Who Are Blind or Severely Disabled.

**ACTION:** Additions to and deletions from procurement list.

**SUMMARY:** This action adds to the Procurement List services to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and deletes from the Procurement List services previously furnished by such agencies.

**EFFECTIVE DATE:** May 16, 2004.

**ADDRESSES:** Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202-3259.

**FOR FURTHER INFORMATION CONTACT:** Sheryl D. Kennerly, (703) 603-7740.

### SUPPLEMENTARY INFORMATION:

#### Additions

On February 13, 2004, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice (69 FR 7191) of proposed additions to the Procurement List. After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the services and impact of the additions on the current or most recent contractors, the Committee has determined that the services listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46-48c and 41 CFR 51-2.4.

#### Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the services to the Government.

2. The action will result in authorizing small entities to furnish the services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46-48c) in connection with the services proposed for addition to the Procurement List.

#### End of Certification

Accordingly, the following services are added to the Procurement List:

#### Services

*Service Type/Location:* Custodial Services, Federal Building, U.S. Post Office and Courthouse, 300 E. 3rd Street, North Platte, Nebraska.

*NPA:* Goodwill Employment Services of Central Nebraska, Inc., Grand Island, Nebraska.

*Contract Activity:* GSA, Public Buildings Service (Region 6), Kansas City, Missouri.

*Service Type/Location:* Grounds Maintenance, Pueblo Chemical Depot, Installation Acreage, Pueblo, Colorado.

*NPA:* Pueblo Diversified Industries, Inc., Pueblo, Colorado.

*Contract Activity:* U.S. Army, Rocky Mountain Arsenal, Commerce City, Colorado.

#### Deletions

On February 20, 2004, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice (69 FR 7907) of proposed deletions to the Procurement List.

After consideration of the relevant matter presented, the Committee has determined that the services listed below are no longer suitable for procurement by the Federal Government under 41 U.S.C. 46-48c and 41 CFR 51-2.4.

#### Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action may result in additional reporting, recordkeeping or other compliance requirements for small entities.

2. The action may result in authorizing small entities to furnish the services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46-48c) in connection with the services deleted from the Procurement List.

#### End of Certification

Accordingly, the following services are deleted from the Procurement List:

#### Services

*Service Type/Location:* Operation of Recycling Center, Minot Air Force Base, North Dakota.

*NPA:* Minot Vocational Adjustment Workshop, Inc., Minot, North Dakota.

*Contract Activity:* Department of the Air Force, Minot Air Force Base, North Dakota.

*Service Type/Location:* Parts Sorting, Defense Reutilization and Marketing Office, Fort Lewis, Washington.

*NPA:* Morningside, Olympia, Washington.

*Contract Activity:* Defense Logistics Agency, Battle Creek, Michigan.

**Sheryl D. Kennerly,**

*Director, Information Management.*

[FR Doc. 04-8689 Filed 4-15-04; 8:45 am]

**BILLING CODE 6353-01-P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

[A-557-812]

### Notice of Final Determination of Sales at Not Less Than Fair Value: Certain Color Television Receivers From Malaysia

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** On November 28, 2003, the Department of Commerce published its preliminary determination of sales at not less than fair value of certain color television receivers from Malaysia. The period of investigation is April 1, 2002, through March 31, 2003.

Based on our analysis of the comments received, we have made changes in the margin calculations. Therefore, the final determination differs from the preliminary determination. The final weighted-average dumping margins are listed below in the section entitled "Final Determination Margins."

**EFFECTIVE DATE:** April 16, 2004.

**FOR FURTHER INFORMATION CONTACT:** Mike Strollo or Gregory Kalbaugh at (202) 482-0629 and (202) 482-3693, respectively, AD/CVD Enforcement, Office 2, Import Administration,

International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

### Final Determination

We determine that certain color television receivers (CTVs) from Malaysia are not being sold, or are not likely to be sold, in the United States at less than fair value (LTFV), as provided in section 735 of the Tariff Act of 1930, as amended (the Act). The estimated margins of sales at not LTFV are shown in the "Final Determination Margins" section of this notice.

### Case History

The preliminary determination in this investigation was issued on November 21, 2003. *See Notice of Negative Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Negative Preliminary Determination of Critical Circumstances: Certain Color Televisions From Malaysia*, 68 FR 66810 (Nov. 28, 2003) (*Preliminary Determination*).

Since the preliminary determination, the following events have occurred. In December 2003, we conducted verification of the questionnaire responses of the sole respondent in this case, Funai Electric (Malaysia) Sdn. Bhd (Funai Malaysia).

In February 2004, we received case and rebuttal briefs from the petitioners (Five Rivers Electronic Innovations, LLC, the International Brotherhood of Electrical Workers, and the Industrial Division of the Communications Workers of America) and Funai Malaysia. The Department held a public hearing on March 11, 2003, at the request of the petitioners.

### Scope of the Investigation

For purposes of this investigation, the term "certain color television receivers" includes complete and incomplete direct-view or projection-type cathode-ray tube color television receivers, with a video display diagonal exceeding 52 centimeters, whether or not combined with video recording or reproducing apparatus, which are capable of receiving a broadcast television signal and producing a video image. Specifically excluded from this investigation are computer monitors or other video display devices that are not capable of receiving a broadcast television signal.

The color television receivers subject to this investigation are currently classifiable under subheadings 8528.12.2800, 8528.12.3250, 8528.12.3290, 8528.12.4000,

8528.12.5600, 8528.12.3600, 8528.12.4400, 8528.12.4800, and 8528.12.5200 of the *Harmonized Tariff Schedule of the United States* ("HTSUS"). Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the scope of the merchandise under investigation is dispositive.

### Scope Comments

Prior to the preliminary determination in this case, interested parties in this investigation, Algert Co., Inc., and Panasonic AVC Networks Kuala Lumpur Malaysia Sdn. Bhd (collectively, Algert/Panasonic), requested that Panasonic multi-system, dual/auto voltage CTVs be excluded from the scope of this investigation because: (1) These CTVs are not produced domestically; and (2) they do not compete in any meaningful way with CTVs that are produced in the United States. We preliminarily found that this product fell within the scope of this investigation. Because we have received no further scope comments in this proceeding, we are making a final determination that these products fall within the scope of this investigation.

### Class or Kind

As part of its scope request, Algert/Panasonic argued that the Panasonic multi-system, dual/auto voltage CTVs fall into a separate class or kind of merchandise from other color televisions. We preliminarily found that the CTVs in question did not constitute a separate class or kind of merchandise. Because we have received no further scope comments in this proceeding, we are making a final determination that these products do not constitute a separate class or kind of merchandise.

### Period of Investigation

The period of investigation (POI) is April 1, 2002, through March 31, 2003. This period corresponds to the four most recent fiscal quarters prior to the month of the filing of the petition (*i.e.*, May 2003).

### Analysis of Comments Received

All issues raised in the case briefs by parties to this proceeding and to which we have responded are listed in the Appendix to this notice and addressed in the Decision Memorandum, which is adopted by this notice. Parties can find a complete discussion of the issues raised in this investigation and the corresponding recommendations in this public memorandum, which is on file in the Central Records Unit, room B-099 of the main Commerce Building. In

addition, a complete version of the Decision Memorandum can be accessed directly on the Web at <http://ia.ita.doc.gov/frn/index.html>. The paper copy and electronic version of the Decision Memorandum are identical in content.

### Changes Since the Preliminary Determination

Based on our analysis of comments received, we have made certain changes to the margin calculations. For a discussion of these changes, see the "Margin Calculations" section of the Decision Memorandum.

### Critical Circumstances

The petition contained a timely allegation that there is a reasonable basis to believe or suspect that critical circumstances exist with respect to imports of subject merchandise. Section 735(a)(3) of the Act provides that the Department will determine if: (A)(i) there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise, or (ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value and that there would be material injury by reason of such sales, and (B) there have been massive imports of the subject merchandise over a relatively short period.

In this case, our final determination is negative. Accordingly, a critical circumstances determination is irrelevant because there is no possibility of retroactive suspension of liquidation.

### Verification

As provided in section 782(i) of the Act, we verified the information submitted by the respondent for use in our final determination. We used standard verification procedures including examination of relevant accounting records, production records, and original source documents provided by the respondent.

### Final Determination Margins

We determine that the following percentage weighted-average margins exist:

| Manufacturer/exporter                                     | Margin (percent) |
|---|------------------|
| Funai Electric (Malaysia) Sdn. Bhd (Funai Malaysia) ..... | 0.75             |

### *Suspension of Liquidation*

Because the estimated weighted-average dumping margin for the investigated company is 0.75 percent (*de minimis*), we are not directing the Customs Service to suspend liquidation of entries of CTVs from Malaysia.

### *ITC Notification*

In accordance with section 735(d) of the Act, we have notified the International Trade Commission (ITC) of our determination.

This notice serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing this determination and notice in accordance with sections section 735(d) and 777(i) of the Act.

Dated: April 12, 2004.

**Jeffrey May,**

*Acting Assistant Secretary for Import Administration.*

### **Appendix—Issues in the Decision Memorandum**

1. Unreported Sales and Cost Data
2. Returns of Subject Merchandise
3. Date of Sale/Date of Shipment
4. U.S. Billing Adjustments
5. Unreported Sales Discounts
6. U.S. Rebates
7. U.S. Inland Insurance Expenses
8. U.S. Other Transportation Expenses
9. U.S. Customs Duties
10. U.S. Indirect Warranty Expenses/U.S. International Freight Expense
11. Date of Payment/Letter of Credit Sales
12. Calculation of Imputed Credit Expenses
13. U.S. Indirect Selling Expenses
14. Expenses Associated with Sample Sales
15. Reclassification of Foreign Indirect Selling Expenses as G&A
16. Treatment of Indirect Selling Expenses in Malaysia and Japan
17. Home Market Credit Expenses and Commission Offset
18. Clerical Errors in the Preliminary Determination
19. Affiliated Manufacturer of A Major Input
20. Major Input Transfer Price
21. Raw Materials Cost
22. Parent Company General and Administrative Expense Allocation
23. Negative General and Administrative Departmental Expenses
24. Research and Development Costs
25. Short-Term Income Offset to Financial Expenses

26. CV Profit

[FR Doc. 04–8692 Filed 4–15–04; 8:45 am]

**BILLING CODE 3510–DS–P**

## **DEPARTMENT OF COMMERCE**

### **International Trade Administration**

**[A–570–884]**

### **Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers From the People's Republic of China**

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**EFFECTIVE DATE:** April 16, 2004.

**FOR FURTHER INFORMATION CONTACT:** Irina Itkin or Elizabeth Eastwood, Office of AD/CVD Enforcement, Office 2, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–0656 or (202) 482–3874, respectively.

### **Final Determination**

We determine that certain color television receivers (CTVs) from the People's Republic of China (PRC) are being sold, or are likely to be sold, in the United States at less than fair value (LTFV), as provided in section 735 of the Tariff Act of 1930, as amended (the Act). The estimated margins of sales at LTFV are shown in the "Suspension of Liquidation" section of this notice.

### *Case History*

The preliminary determination in this investigation was issued on November 21, 2003. *See Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Affirmative Preliminary Determination of Critical Circumstances: Certain Color Television Receivers From the People's Republic of China* FR 66800 (Nov. 28, 2003) (*Preliminary Determination*).

Since the preliminary determination, the following events have occurred. In December 2003 and January 2004, we conducted verification of the questionnaire responses of the four participating respondents in this case, Konka Group Company, Ltd. (Konka); Sichuan Changhong Electric Co., Ltd. (Changhong); TCL Holding Company Ltd. (TCL); and Xiamen Overseas Chinese Electronic Co., Ltd. (XOCECO).

We gave interested parties an opportunity to comment on the

preliminary determination. In February 2004, we received case and rebuttal briefs from the petitioners (Five Rivers Electronic Innovations, LLC, the International Brotherhood of Electrical Workers, and the Industrial Division of the Communications Workers of America), Changhong, Konka, TCL, and XOCECO. We also received case briefs from one additional PRC exporter of subject merchandise, Philips Consumer Electronics Co. of Suzhou Ltd. (Philips), three U.S. importers (*i.e.*, Apex Digital, Inc. (Apex); Sears, Roebuck & Co. (Sears); and Wal-Mart Stores, Inc. (Wal-Mart)), and the China Chamber of Commerce for Imports and Exports of Machinery and Electronic Products (CCME). The Department held a public hearing on March 3, 2004, at the request of Changhong, Konka, and TCL.

On February 23, 2004, Changhong requested that any antidumping order issued by the Department in this proceeding include scope language which states that varieties of CTVs that do not use a cathode ray tube are not included in the scope of this investigation. On April 5, 2004, the petitioners filed comments objecting to Changhong's February 23 request. For further discussion, see the "Scope Comments" section of this notice, below.

### *Scope of the Investigation*

For purposes of this investigation, the term "certain color television receivers" includes complete and incomplete direct-view or projection-type cathode-ray tube color television receivers, with a video display diagonal exceeding 52 centimeters, whether or not combined with video recording or reproducing apparatus, which are capable of receiving a broadcast television signal and producing a video image. "Incomplete" CTVs are defined as unassembled CTVs with a color picture tube (*i.e.*, cathode ray tube), printed circuit board or ceramic substrate, together with the requisite parts to comprise a complete CTV, when assembled. Specifically excluded from this investigation are computer monitors or other video display devices that are not capable of receiving a broadcast television signal.

The color television receivers subject to this investigation are currently classifiable under subheadings 8528.12.2800, 8528.12.3250, 8528.12.3290, 8528.12.4000, 8528.12.5600, 8528.12.3600, 8528.12.4400, 8528.12.4800, and 8528.12.5200 of the *Harmonized Tariff Schedule of the United States* (HTSUS). Although the HTSUS subheading is provided for convenience and customs

purposes, the written description of the scope of the merchandise under investigation is dispositive, and parts or imports of assemblages of parts that comprise less than a complete CTV.

#### Scope Comments

On February 13, 2004, the petitioners placed on the record information to clarify the definition of "incomplete" CTVs, as used in the petition. The petitioners note that "incomplete" CTVs are defined as unassembled CTVs with a color picture tube (*i.e.*, cathode ray tube), printed circuit board or ceramic substrate, together with the requisite parts to comprise a complete CTV, when assembled. The petitioners also state that the scope language was not intended to cover parts or imports of assemblages of parts that comprise less than a complete CTV. *See* the petitioners' February 13 letter at page 2. The petitioners also note that the Court of International Trade (CIT) upheld this definition of "incomplete" CTVs in a separate antidumping proceeding on CTVs from the Republic of Korea. *See Goldstar Co., Ltd. v. United States*, 692 F. Supp. 1382, 1386–87 (CIT 1988).

On February 23, 2004, Changhong requested that the scope language be adjusted to include language to specify that varieties of CTVs which do not use a cathode ray tube (*e.g.*, plasma, LCD, DPL, and LCoS CTVs) are not included in the scope of this investigation. Changhong contends that these types of CTVs are not included because the petitioners' February 12 submission makes it clear that only CTVs with a cathode ray tube are covered by the scope of this investigation and, therefore, CTVs that do not include a cathode ray tube are not covered by the scope of this investigation.

On April 5, 2004, the petitioners submitted comments opposing Changhong's request to change the scope language. The petitioners maintain that the scope language contained in the petition, and relied on in the preliminary determination, clearly states that this investigation covers only those CTVs which incorporate a cathode ray tube. Additionally, the petitioners contend that it would be inappropriate to name the types of products that might potentially be excluded (*e.g.*, plasma, LCD, DPL, and LCoS), because these terms are imprecise. After considering Changhong's and the petitioners' comments, we find that the scope language contained in the petition clearly excludes CTVs that do not use a cathode ray tube and, therefore, have not revised the scope language for the final determination.

#### Period of Investigation

The period of investigation is October 1, 2002, through March 31, 2003, which corresponds to the two most recent fiscal quarters prior to the month of the filing of the petition (*i.e.*, May 2003).

#### Nonmarket Economy Status for the PRC

The Department has treated the PRC as a nonmarket economy (NME) country in all past antidumping investigations. *See, e.g., Final Determination of Sales at Less Than Fair Value and Critical Circumstances: Certain Malleable Iron Pipe Fittings From the People's Republic of China*, 68 FR 61395, 61396 (Oct. 28, 2003). A designation as a NME remains in effect until it is revoked by the Department. *See* section 771(18)(C) of the Act. No party in this investigation has requested a revocation of the PRC's NME status. Therefore, we have continued to treat the PRC as an NME in this investigation. For further details, *see Preliminary Determination* 68 FR at 66803.

#### Market Oriented Industry

On July 15, 2003, Changhong requested that the Department make a determination that the CTV industry in the PRC is a market-oriented industry (MOI). After analyzing this claim, we notified Changhong that its claim must be made on behalf of the CTV industry as a whole, rather than on behalf of a specific exporter. Based on this guidance, in August and September 2003, Changhong, Konka, TCL, and XOCECO, as well as three additional PRC exporters of subject merchandise (*i.e.*, Haier Electric Appliances International Co. (Haier), Philips, and Shenzhen Chaungwei-RGB Electronics Co., Ltd. (Skyworth)) submitted additional information to show that the CTVs industry in the PRC is market-oriented. Again, we analyzed this claim and found that it did not sufficiently address the three prongs of the Department's MOI test. As a consequence, we notified the respondents in the preliminary determination that we were unable to conclude that the experiences of the firms making the claim are representative of the CTV industry in the PRC.

In March 2003, XOCECO, Prima Technology, Inc., and the CCME submitted information purportedly delineating the ownership and production levels of the top ten television producers in the PRC.<sup>1</sup> In

February 2004, the CCME filed a case brief in which it argued that the information submitted by the respondents in this case demonstrates that each prong of the MOI test is met and the Department should find that the CTV industry in the PRC is market-oriented. We also received comments from the petitioners, who maintain that the Department should continue to find that the CTV industry is not an MOI.

In order to consider an MOI claim, the Department requires information on each of the three prongs of the MOI test regarding the situation and experience of the PRC CTV industry as a whole. Specifically, the MOI test requires that: (1) There be virtually no government involvement in production or prices for the industry; (2) the industry is marked by private or collective ownership that behaves in a manner consistent with market considerations; and (3) producers pay market-determined prices for all major inputs, and for all but an insignificant proportion of minor inputs. Additionally, an MOI allegation must cover all (or virtually all) of the producers in the industry in question. *See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Synthetic Indigo From the People's Republic of China*, 64 FR 69723, 69725 (Dec. 14, 1999). *See also Notice of Final Determination of Sales at Less Than Fair Value: Freshwater Crawfish Tail Meat From the People's Republic of China*, 62 FR 41347, 41353 (Aug. 1, 1997). As a threshold matter, we note that the industry coverage of the respondents' claims remains uncertain and, in any case, inadequate. Moreover, even if respondents' MOI claim had been sufficient with respect to industry coverage, the data provided by the respondents strongly suggest that the CTV industry does not satisfy the second prong of the MOI test. Because the MOI allegation made in this case has not provided an adequate basis for considering the three factors of the Department's MOI test, we are unable to consider the MOI request. For a further discussion of this issue, *see* the Decision Memorandum at *Comment 1*.

#### Separate Rates

In our preliminary determination, we found that Changhong, Konka, TCL, and XOCECO had met the criteria for receiving a separate antidumping rate. We have not received any information since the preliminary determination

<sup>1</sup> This data was originally filed on December 2, 2003, however, XOCECO did not include in this submission any certifications from the companies from whom this information was obtained, nor did

it submit the majority of the reports on which it relied in making its arguments. As a result, the Department requested that XOCECO and the CCME resubmit this data, which they did on March 17, 2004.

which would warrant reconsideration of our separate-rate determination with respect to these companies. Therefore, we continue to find that each of these exporters should be assigned an individual dumping margin. For a complete discussion of the Department's determination that the respondents are entitled to separate rates, see *Preliminary Determination* at 68 FR 66804.

#### *Margins for Cooperative Exporters Not Selected*

For our final determination, consistent with our preliminary determination, we have calculated a weighted-average margin for Haier, Hisense Import and Export Co., Ltd., Philips, Skyworth, Starlight International Holdings, Ltd., Star Light Electronics Co., Ltd., Star Fair Electronics Co., Ltd., Starlight Marketing Development Ltd., and SVA Group Co., Ltd. based on the rates calculated for those exporters that were selected to respond in this investigation, excluding any rates that are zero, *de minimis* or based entirely on adverse facts available. See *Preliminary Determination*, 68 FR at 66805. Companies receiving this rate are identified by name in the "Continuation of Suspension of Liquidation" section of this notice.

#### *Surrogate Country*

For purposes of the final determination, we continue to find that India is the appropriate primary surrogate country for the PRC. For further discussion and analysis regarding the surrogate country selection for the PRC, see *Preliminary Determination*, 68 FR at 66807.

#### *PRC-Wide Rate and Use of Facts Otherwise Available*

As explained in the Department's *Preliminary Determination*, there are numerous producers/exporters of the subject merchandise in the PRC. However, as noted in the preliminary determination, all exporters were given the opportunity to respond to the Department's questionnaire. Based upon our knowledge of the PRC and the fact that U.S. import statistics show that the responding companies did not account for all imports into the United States from the PRC, we have determined that certain PRC exporters of CTVs failed to respond to our questionnaire. For this reason, we determined that some PRC exporters of subject merchandise failed to cooperate in this investigation. In accordance with our standard practice, as adverse facts available, we are assigning as the PRC-wide rate the

higher of: (1) The highest margin listed in the notice of initiation; or (2) the margin calculated for any respondent in this investigation. See, e.g., *Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon Quality Steel Products From The People's Republic of China*, 65 FR 34660 (May 31, 2000), and accompanying Decision Memorandum at *Comment 1*. For purposes of the final determination of this investigation, we are using the margin stated in the notice of initiation (i.e., 78.45 percent) as adverse facts available because it is higher than the margin we calculated for Changhong, Konka, TCL, or XOCECO. In the preliminary determination we examined the price and cost information provided in the petition to corroborate this margin. See the *Preliminary Determination* at 68 FR 66806.

#### *Analysis of Comments Received*

All issues raised in the case briefs by parties to this proceeding and to which we have responded are listed in the Appendix to this notice and addressed in the Decision Memorandum, which is adopted by this notice. Parties can find a complete discussion of all issues raised in this investigation and the corresponding recommendations in this public memorandum, which is on file in the Central Records Unit, room B-099, of the main Department building. In addition, a complete version of the Decision Memorandum can be accessed directly on the Web at <http://ia.ita.doc.gov>. The paper copy and electronic version of the Decision Memorandum are identical in content.

#### *Changes Since the Preliminary Determination*

Based on our analysis of comments received, we have made certain changes to the margin calculations. For a discussion of these changes, see the "Margin Calculations" section of the Decision Memorandum.

#### *Critical Circumstances*

In our preliminary determination, we found that critical circumstances existed for all mandatory respondents, companies subject to the "all others" rate, and companies subject to the PRC-wide rate.

After the preliminary determination, each of the mandatory respondents provided additional information regarding their shipments. In addition, Philips, which submitted a voluntary response, reported its shipments for the period January 2001 through September 2003. We received comments on this data from three of the four mandatory respondents (i.e., Changhong, Konka,

and TCL), Philips, and three importers of CTVs (i.e., Apex, Sears, and Wal-Mart). These companies argued that we should no longer find that critical circumstances exist, based on one or more of the following arguments: (1) The Department now has more data on which to base its analysis; (2) the Department should disregard shipments made under pre-petition contracts; (3) the Department should adjust Changhong's shipment data to account for delays due to the severe acute respiratory syndrome (SARS) epidemic; (4) imports of CTVs are heavily seasonal; (5) there is insufficient data on the record to perform a seasonality analysis for certain companies; and (6) there is no evidence that importers had knowledge that PRC companies were dumping. We also received comments from the petitioners, who support the preliminary finding of critical circumstances for all parties.

Based on new information on the record of this investigation and information contained in our preliminary affirmative critical circumstances determinations, we have revised our determination and find that for purposes of the final determination, critical circumstances do not exist with regard to imports of CTVs from the PRC. For further details, see the Decision Memorandum at *Comment 3*; see also the April 12, 2004, memorandum from the Team to Louis Apple entitled, "Antidumping Duty Investigation of Certain Color Television Receivers (CTVs) from the People's Republic of China (PRC)—Final Negative Determination of Critical Circumstances."

#### *Verification*

As provided in section 782(i) of the Act, we verified the information submitted by the respondents for use in our final determination. We used standard verification procedures including examination of relevant accounting and production records, and original source documents provided by the respondents.

#### *Continuation of Suspension of Liquidation*

Pursuant to section 735(c)(1)(B) of the Act, we will instruct Customs and Border Protection (CBP) to continue to suspend liquidation of all imports of subject merchandise from the PRC entered, or withdrawn from warehouse, for consumption on or after November 28, 2003, the date of publication of our preliminary determination. However, because we find that critical circumstances do not exist with regard to imports of CTVs from the PRC, we

will instruct the CBP to terminate the retroactive suspension of liquidation, between August 30, 2003, (90 days prior to the date of publication of the preliminary determination) and November 28, 2003, which was instituted due to the preliminary affirmative critical circumstances finding. The CBP shall also release any bond or other security, and refund any cash deposit required, under section 733(d)(1)(B) of the Act with respect to entries of the merchandise the liquidation of which was suspended retroactively under section 733(e)(2) of the Act. For entries on or after November 28, 2003, the CBP shall continue to require a cash deposit or the posting of a bond equal to the estimated amount by which the normal value exceeds the U.S. price as shown below. These instructions suspending liquidation will remain in effect until further notice.

The dumping margins are provided below:

| Manufacturer/exporter                                | Weighted-average margin (in percent) |
|--|--------------------------------------|
| Haier Electric Appliances International Co .....     | 21.49                                |
| Hisense Import and Export Co., Ltd .....             | 21.49                                |
| Konka Group Company, Ltd .....                       | 11.36                                |
| Philips Consumer Electronics Co. of Suzhou Ltd ..... | 21.49                                |
| Shenzhen Chaungwei-RGB Electronics Co., Ltd .....    | 21.49                                |
| Sichuan Changhong Electric Co., Ltd .....            | 24.48                                |
| Starlight International Holdings, Ltd .....          | 21.49                                |
| Star Light Electronics Co., Ltd .....                | 21.49                                |
| Star Fair Electronics Co., Ltd ...                   | 21.49                                |
| Starlight Marketing Development Ltd .....            | 21.49                                |
| SVA Group Co., Ltd .....                             | 21.49                                |
| TCL Holding Company Ltd .....                        | 22.36                                |
| Xiamen Overseas Chinese Electronic Co., Ltd .....    | 4.35                                 |
| PRC-wide .....                                       | 78.45                                |

The PRC-wide rate applies to all entries of the subject merchandise except for entries from exporters/producers that are identified individually above.

#### Disclosure

We will disclose the calculations performed within five days of the date of publication of this notice to parties in this proceeding in accordance with 19 CFR 351.224(b).

#### ITC Notification

In accordance with section 735(d) of the Act, we have notified the International Trade Commission (ITC) of

our determination. As our final determination is affirmative, the ITC will, within 45 days, determine whether these imports are materially injuring, or threaten material injury to, the U.S. industry. If the ITC determines that material injury or threat of material injury does not exist, the proceeding will be terminated and all securities posted will be refunded or canceled. If the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing the CBP to assess antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation.

#### Notification Regarding APO

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This determination is issued and published pursuant to sections 735(d) and 777(i)(1) of the Act.

Dated: April 12, 2004.

**Jeffrey A. May,**  
*Acting Assistant Secretary for Import Administration.*

#### Appendix—Issues in the Decision Memorandum

##### Comments

##### General Issues

1. Market-Oriented Industry (MOI) Claim
2. Respondent Selection
3. Critical Circumstances
4. Updating the PRC Labor Rate
5. Indian Imports of Small Quantities
6. Surrogate Value for Electricity
7. Market Economy Purchases from Indonesia, Korea, and Thailand
8. Market-Economy Purchases from Hong Kong Trading Companies
9. Surrogate Value Data Obtained from [www.infodriveindia.com](http://www.infodriveindia.com)
10. Using Market-Economy Purchases Made by one PRC Respondent to Value the Factors of Production for Other PRC Respondents
11. Surrogate Value for 25-inch Curved CPTs
12. Surrogate Value for 29-inch CPTs
13. Surrogate Value for Speakers
14. Selection of the Appropriate Surrogate Financial Statements
15. Adjustments to the Surrogate Financial Ratios to Account for Freight, Price Adjustments, Non-Applicable Selling Expenses, Packing, and Taxes

16. Adjustments to the Surrogate Factory Overhead Ratios
  17. Additional Adjustments to the Surrogate Financial Ratios for BPL, Onida Saka, and Videocon
  18. Additional Adjustments to the Surrogate Financial Ratios for Calcom, Kalyani and Matsushita
  19. Additional Adjustment to the Surrogate Financial Ratios to Account for Selling, General, and Administrative (SG&A) Labor
  20. Treatment of Finished Goods in the Surrogate Financial Ratio Calculations
  21. Weighted- vs. Simple-Average Surrogate Financial Ratios
  22. Clerical Errors in the Preliminary Determination
  23. Corrections Arising from Verification
- Company-Specific Issues*
24. New Factual Information in Changhong's Surrogate Value Submission
  25. Changhong Market-Economy Purchases
  26. Date of Sale for Konka
  27. TCL's Unreported U.S. Sales
  28. TCL's Brokerage and Handling Expenses
  29. Surrogate Value for TCL's Magnetic Circle Inductors
  30. Surrogate Value for TCL's Aluminum and Iron Heat Sinks and Heating Plates
  31. Distance from TCL's Factory to TCL Hong Kong
  32. TCL's Energy Consumption
  33. Use of TCL's "Actual" SG&A Rate
  34. Use of Total Adverse Facts Available for XOCECO
  35. Screen Type Code for XOCECO
  36. XOCECO's U.S. Warranty Expenses
  37. XOCECO's U.S. Warehousing and Other Transportation Expenses
  38. XOCECO's Supplier Distances and Supplier Modes of Transportation
  39. Reclassification of Certain of XOCECO's Components as "Miscellaneous"
  40. XOCECO's Packed Weights
  41. Offset for Sales of Tin Scrap Generated During XOCECO's Production Process
  42. Labor Hours for XOCECO's Printed Circuit Board (PCB) Factory
  43. XOCECO's Projection Factory Weights
  44. XOCECO's Electricity Consumption

[FR Doc. 04-8694 Filed 4-15-04; 8:45 am]

BILLING CODE 3510-DS-P

## DEPARTMENT OF COMMERCE

### International Trade Administration

A-122-814

#### Pure Magnesium from Canada; Preliminary Results of Antidumping Duty Administrative Review and Preliminary Partial Rescission of Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**ACTION:** Notice of Preliminary Results of the 2002-2003 Administrative Review.

**SUMMARY:** In response to requests from interested parties, the Department of

Commerce is conducting an administrative review of the antidumping duty order on pure magnesium from Canada with respect to Norsk Hydro Canada Inc. The period of review is August 1, 2002 through July 31, 2003.

We preliminarily find that, during the period of review, sales of pure magnesium from Canada were not made below normal value. If these preliminary results are adopted in our final results, we will instruct the U.S. Customs and Border Protection not to assess antidumping duties. We invite interested parties to comment on these preliminary results. We will issue the final results not later than 120 days from the date of publication of this notice.

**EFFECTIVE DATE:** April 16, 2004.

**FOR FURTHER INFORMATION CONTACT:** Julie Santoboni or Scott Holland, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington DC 20230; telephone (202) 482-4194 or (202) 482-1279, respectively.

**SUPPLEMENTARY INFORMATION:**

**Background**

On August 31, 1992, the Department of Commerce ("the Department") published in the **Federal Register** (57 FR 39390) an antidumping duty order on pure magnesium from Canada. On August 1, 2003, the Department published a notice in the **Federal Register** of the opportunity for interested parties to request an administrative review of the antidumping duty order on pure magnesium from Canada. *See Notice of Opportunity to Request Administrative Review of Antidumping or Countervailing Duty Order, Finding, or Suspend Investigation* (68 FR 45218). On August 26, 2003, U.S. Magnesium, LLC ("the petitioner") requested an administrative review of imports of the subject merchandise produced by Norsk Hydro Canada, Inc. ("NHCI") and Magnola Metallurgy Inc. ("Magnola"), both Canadian exporters/producers of the subject merchandise.

On September 2, 2003, Magnola reported that it had no shipments of subject merchandise to the United States during the August 1, 2002, through July 31, 2003, period of review ("POR"). *See "Partial Rescission"* section, below.

On September 3, 2003, NHCI requested that the Department reject the petitioner's request for administrative review because the submission failed to meet the minimal requirements as described in 19 CFR 351.213(b)(1). On

October 1, 2003, we determined that the petitioner's review request sufficiently met the Department's requirements pursuant to 19 CFR 351.213(b)(1). *See* the October 1, 2003, memorandum to Susan Kuhbach, "Petitioner's Request for Initiation in the 2002/2003 Antidumping Administrative Review," which is on file in the Department's Central Records Unit ("CRU").

In accordance with 19 CFR 351.221(b)(1), we published a notice of initiation of this antidumping duty administrative review on September 30, 2003, with respect to NHCI and Magnola. *See Notice of Initiation of Antidumping and Countervailing Duty Administrative Reviews, Request for Revocation in Part and Deferral of Administrative Review*, (68 FR 56262).

On October 9, 2003, the Department issued an antidumping duty questionnaire to NHCI. On November 21, 2003, we received NHCI's questionnaire response. We issued a supplemental questionnaire to NHCI on January 9, 2004, and received the response on February 6, 2004.

On December 11, 2003, in accordance with 19 CFR 351.301(d)(2)(ii), the petitioner filed an allegation that NHCI had made sales below the cost of production ("COP") during the POR. NHCI submitted objections to the allegation in December 2003, and January and February 2004. The petitioner filed responses to NHCI's objections in December 2003 and January 2004. We found that the petitioner did not provide a reasonable basis to believe or suspect that NHCI sold pure magnesium in the home market at prices below the COP during the POR. *See* the February 18, 2004, memorandum to Susan Kuhbach, "Allegation of Sales Below Cost of Production." Accordingly, we did not initiate a sales-below-COP investigation.

**Scope of the Order**

The merchandise covered by this review is pure magnesium. Pure unwrought magnesium contains at least 99.8 percent magnesium by weight and is sold in various slab and ingot forms and sizes. Granular and secondary magnesium are excluded from the scope currently classifiable under subheading 8104.11.0000 of the *Harmonized Tariff Schedule of the United States* ("HTSUS"). Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this proceeding is dispositive.

**Partial Rescission**

In accordance with 19 CFR 351.213(d)(3), we are preliminarily rescinding this review with respect to Magnola, which reported that it made no shipments of subject merchandise during this POR. We examined shipment data furnished by U.S. Customs and Border Protection ("CBP") and are satisfied that the record does not indicate that there were U.S. shipments of subject merchandise from Magnola during the POR.

**Fair Value Comparisons**

To determine whether sales of pure magnesium by NHCI to the United States were made at less than normal value ("NV"), we compared, as appropriate, export price ("EP"), to NV, as described in the "Export Price" and "Normal Value" sections below. In accordance with 19 CFR 351.414(c)(2), we compared individual EPs to weighted-average NVs, which were calculated in accordance with section 777A(d)(2) of the Tariff Act of 1930, as amended ("the Act").

**Product Comparisons**

In accordance with section 771(16) of the Act, we considered all products produced and sold by NHCI in the home market during the POR that fit the description in the "Scope of the Order" section of this notice to be foreign like products for purposes of determining appropriate product comparisons to U.S. sales. We compared U.S. sales to sales of identical merchandise in the home market made in the ordinary course of trade. To determine the appropriate product comparisons, we considered the following physical characteristics of the products: ASTM specification code, purity, format, size and grade.

**Export Price**

For sales to the United States, we used EP, as defined in section 772(a) of the Act, because the merchandise was sold directly to the first unaffiliated purchaser in the United States prior to importation. The use of constructed export prices was not warranted based on the facts of the record. EP was based on the packed price to unaffiliated purchasers in the United States. We made deductions, consistent with section 772(c)(2)(A) of the Act, for the following movement expenses: inland freight from the plant to the distribution warehouse; pre-sale warehousing expense; inland freight from the distribution warehouse to the unaffiliated customer; and foreign brokerage and handling.

## Normal Value

### A. Home Market Viability

In order to determine whether there was a sufficient volume of sales of pure magnesium in the home market to serve as a viable basis for calculating NV, we compared NHCI's volume of home market sales of the foreign like product to the volume of U.S. sales of the subject merchandise, in accordance with section 773(a) of the Act. Because the aggregate volume of home market sales of the foreign like product was greater than five percent of the respective aggregate volume of U.S. sales for the subject merchandise, we determined that the home market provided a viable basis for calculating NV. Therefore, in accordance with section 773(a)(1)(B)(i) of the Act, we based NV on the prices at which the foreign like product was first sold for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade.

We calculated NV based on the price to unaffiliated customers in the home market. We adjusted the starting price for billing adjustments, where appropriate. We made adjustments, consistent with section 773(a)(6)(B)(ii) of the Act, for the following movement expenses: inland freight from the plant to the distribution warehouse; warehousing expense; and inland freight from the plant/warehouse to the customer. In addition, we made adjustments for differences in circumstances of sale ("COS") in accordance with 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410. We made COS adjustments by deducting direct selling expenses incurred on home market sales (credit expenses) and adding U.S. direct selling expenses (credit expenses). We also deducted home market packing costs and added U.S. packing costs in accordance with sections 773(a)(6)(A) and (B) of the Act. We disregarded two home market sales that were made outside the ordinary course of trade, consistent with section 771(15) of the Act and 19 CFR 351.102, because either the sale was made for non-commercial purposes or the sale was a sample sale that was not made in substantial quantities. See February 6, 2004, Supplemental Questionnaire Response submitted by NHCI.

### Currency Conversion

We made currency conversions into U.S. dollars in accordance with section 773A(a) of the Act based on the exchange rates in effect on the dates of the U.S. sales as reported by the Federal Reserve Bank.

## Preliminary Results of the Review

As a result of this review, we preliminarily find that NHCI's percentage weighted-average margin for the period August 1, 2002, through July 31, 2003, is 0.01 percent, *de minimis*.

### Assessment Rates and Cash Deposit Requirements

Pursuant to 19 CFR 351.212(b), the Department calculates an assessment rate for each importer of the subject merchandise. Upon issuance of the final results of this administrative review, if any importer-specific assessment rates calculated in the final results are above *de minimis* (i.e., at or above 0.5 percent), the Department will issue appraisal instructions directly to CBP to assess antidumping duties on appropriate entries by applying the assessment rate to the entered value of the merchandise. For assessment purposes, we calculate importer-specific assessment rates for the subject merchandise by aggregating the dumping duties due for all U.S. sales to each importer and dividing the amount by the total entered value of the sales to that importer.

Pending the final disposition of a NAFTA panel review, the Department will not order the liquidation of entries of pure magnesium from Canada exported by NHCI on or after August 1, 2000, at this time.<sup>1</sup> Liquidation will occur following the final judgement in the NAFTA panel appeals process.

The following deposit requirements will be effective upon completion of the final results of this administrative review for all shipments of pure magnesium from Canada entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(1) of the Act: (1) the cash deposit rate for the reviewed company will be the rate established in the final results of this administrative review (except no cash deposit will be required for the company if its weighted-average margin is *de minimis*, i.e., less than 0.5 percent); (2) for merchandise exported by manufacturers or exporters not covered in this review but covered in the original less-than-fair-value investigation or a previous review, the cash deposit rate will continue to be the most recent rate published in the final determination or final results for which the manufacturer or exporter received an individual rate; (3) if the exporter is

not a firm covered in this review, the previous review, or the original investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) if neither the exporter nor the manufacturer is a firm covered in this or any previous reviews, the cash deposit rate will be 21 percent, the "all others" rate established on November 29, 1993, in *Pure Magnesium from Canada; Amendment of Final Determination of Sales At Less Than Fair Value and Order in Accordance With Decision on Remand* (58 FR 62643).

### Public Comment

Any interested party may request a hearing within 30 days of publication of this notice. A hearing, if requested, will be held 37 days after the publication of this notice, or the first business day thereafter. Interested parties may submit case briefs within 30 days of the date of publication of this notice. Rebuttal briefs, which must be limited to issues raised in the case briefs, may be filed not later than 35 days after the date of publication of this notice. The Department will issue the final results of this administrative review, which will include the results of its analysis of issues raised in any such comments, within 120 days of publication of the preliminary results.

### Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: April 9, 2004.

**James J. Jochum,**

*Assistant Secretary for Import Administration.*

[FR Doc. 04-8691 Filed 4-15-04; 8:45 am]

**BILLING CODE 3510-DS-S**

<sup>1</sup> See January 28, 2003, letter from the Department granting NHCI's October 23, 2002, request for the continuation of suspension of liquidation covering all unliquidated entries of subject merchandise exported by NHCI on or after August 1, 2000.

**DEPARTMENT OF COMMERCE****International Trade Administration****[C-475-821]****Certain Cut-to-Length Plate From Italy: Notice of Decision of the Court of International Trade**

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**ACTION:** Notice of decision of the Court of International Trade: Certain cut-to-length plate from Italy.

**SUMMARY:** On March 26, 2004, the United States Court of International Trade (CIT) sustained the Department of Commerce's (the Department) Redetermination Results in all respects. See *ILVA Lamiere e Tubi S.p.A. v. United States*, Court No. 00-03-00127, Slip. Op. 04-29 (CIT, March 26, 2004) ("*Ilva v. United States*"). Consistent with the decision of the United States Court of Appeals for the Federal Circuit ("Federal Circuit") in *Timken Co. v. United States*, 893 F.2d 337 (Fed. Cir. 1990) ("*Timken*"), the Department is notifying the public that the *Ilva v. United States* decision along with the CIT's earlier opinions and orders in this case, discussed below, were "not in harmony" with the Department's original results.

**EFFECTIVE DATE:** April 16, 2004.

**FOR FURTHER INFORMATION CONTACT:** Margaret Ward, Office of AD/CVD Enforcement VI, Group II, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Ave., NW., Washington, DC 20230; telephone: (202) 482-4161.

**SUPPLEMENTARY INFORMATION:****Background**

On December 29, 1999, the Department of Commerce ("the Department") published a notice of its final determination in the countervailing duty investigation in certain cut-to-length carbon quality steel plate from Italy. See *Final Affirmative Countervailing Duty Determination: Certain Cut-to-length Carbon Quality Steel Plate from Italy*, 64 FR 73244 (December 29, 1999) ("*Italian Plate*"). ILVA S.p.A. and ILVA Lamieri e Tubi S.r.l ("Ilva") challenged this determination before the CIT arguing, in relevant part, that the Department misapplied its change in ownership methodology. On August 30, 2000, the CIT granted the Department's request for a voluntary remand, and remanded the *Italian Plate* proceeding to the

Department with instructions to: "issue a determination consistent with United States law, interpreted pursuant to all relevant authority, including the decision of the Court of Appeals for the Federal Circuit in *Delverde, S.r.l. v. United States*, 202 F.3d 1360 (Fed. Cir. 2000)." *ILVA v. United States*, Remand Order (CIT, August 30, 2000). The Department issued its remand results on December 28, 2000. *Final Results of Redetermination Pursuant to Court Remand: ILVA Lamiere e Tubi S.p.A. v. United States* Remand Order (CIT, August 30, 2000) (December 28, 2000).

On March 29, 2002, the CIT remanded the *Italian Plate* proceeding to the Department, and ordered the Department to reexamine the facts of the proceeding pursuant to its instructions. *Ilva v. United States*, Slip. Op. 02-32 (CIT, March 29, 2002). The Department complied with the court's instructions, under protest, and issued its second redetermination on July 2, 2002. *Results of Redetermination Pursuant to Court Remand: ILVA Lamiere e Tubi S.r.l and Ilva S.p.A.*, Remand Order (CIT, March 29, 2002) (July 2, 2002).

On July 29, 2003, the CIT affirmed the Department's second redetermination in part, and reversed it in part. *Ilva v. United States*, Slip. Op. 03-97 (CIT, July 29, 2003). The CIT affirmed the Department's application of the court ordered methodology, but remanded the proceeding, ordering the Department to resolve one issue, still outstanding, pursuant to the CIT's prescribed methodology. The Department complied with the court's instructions, under protest, and issued its third redetermination on August 28, 2003. *Results of Redetermination Pursuant to Court Remand: ILVA Lamiere e Tubi S.r.l and Ilva S.p.A.*, Remand Order (CIT, July 29, 2003) (August 28, 2003). On March 26, 2004, the CIT sustained the Department's Redetermination Results in all respects.

**Timken Notice**

In its decision in *Timken*, the Federal Circuit held that, pursuant to 19 U.S.C. 1516a(e), the Department must publish notice of a decision of the CIT which is "not in harmony" with the Department's results. The CIT's decision in *Ilva v. United States* was not in harmony with the Department's final countervailing duty determination. Therefore, publication of this notice fulfills the obligation imposed upon the Department by the decision in *Timken*. In addition, this notice will serve to continue the suspension of liquidation. If this decision is not appealed, or if appealed, if it is upheld, the Department

will publish amended final countervailing duty results.

Dated: April 9, 2004.

**James J. Jochum,**

*Assistant Secretary for Import Administration.*

[FR Doc. 04-8693 Filed 4-15-04; 8:45 am]

BILLING CODE 3510-DS-P

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****[I.D. 041304A]****Proposed Information Collection; Comment Request; Foreign Fishing Reporting Requirements**

**AGENCY:** National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice.

**SUMMARY:** The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3506(c)(2)(A)).

**DATES:** Written comments must be submitted on or before June 15, 2004.

**ADDRESSES:** Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW, Washington, DC 20230 (or via e-mail at [dHynek@doc.gov](mailto:dHynek@doc.gov)).

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument and instructions should be directed to Bob Dickinson, 301-713-2276, or [Bob.Dickinson@noaa.gov](mailto:Bob.Dickinson@noaa.gov).

**SUPPLEMENTARY INFORMATION:****I. Abstract**

Foreign fishing activities can be authorized under the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*). The collection of information from permitted foreign vessels is necessary to monitor their activities and whereabouts in U.S. waters. Reports are also necessary to monitor the amounts of fish, if any, such vessels receive from U.S. vessels in joint venture operations, wherein U.S. vessels catch and transfer at-sea to permitted foreign vessels certain species for which

U.S. demand is low relative to the abundance of the species.

## II. Method of Collection

Activity reports are made by radio when fishing begins or ceases, to report on the transfers of fish, and to file weekly reports on the catch or receipt of fish. Foreign vessels are also subject to recordkeeping requirements. These include a communications log, a transfer log, a daily fishing log, a consolidated fishing or joint venture log, and a daily joint venture log. These records must be maintained for three years.

## III. Data

*OMB Number:* 0648–0075.

*Form Number:* None.

*Type of Review:* Regular submission.

*Affected Public:* Business or other for-profit organizations.

*Estimated Number of Respondents:* 25.

*Estimated Time Per Response:* 6 minutes for a joint venture report; 30 minutes per day for joint venture recordkeeping; and 7.5 minutes per day for recordkeeping by transport vessels.

*Estimated Total Annual Burden Hours:* 422.

*Estimated Total Annual Cost to Public:* \$500.

## IV. Request for Comments

Comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: April 9, 2004.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 04–8695 Filed 4–15–04; 8:45 am]

BILLING CODE 3510–22–S

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

[I.D. 040904C]

### Proposed Information Collection; Comment Request; In-depth Community Profiling of Fishing Communities in the Southeast Region

**AGENCY:** National Oceanic and Atmospheric Administration (NOAA).

**ACTION:** Notice.

**SUMMARY:** The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

**DATES:** Written comments must be submitted on or before June 15, 2004.

**ADDRESSES:** Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW, Washington, DC 20230 (or via e-mail at [dHynek@doc.gov](mailto:dHynek@doc.gov)).

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument and instructions should be directed to Dr. Brent Stoffle, NOAA Fisheries, Southeast Fisheries Science Center, 75 Virginia Beach Dr., Miami, FL 33149, 305–361–4276.

### SUPPLEMENTARY INFORMATION:

#### I. Abstract

The purpose of this research is to develop in-depth community profiles for fishing communities in the Southeast Region, excluding the U.S. Caribbean. The Magnuson-Stevens Act (MSA), particularly National Standard 8, NS 8), National Environmental Protection Act (NEPA), and Executive Order (EO) 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations) require that social impact analyses be conducted when federal agencies propose new regulations. These analyses require the social and cultural baseline data for various stakeholders, including descriptions of the commercial, recreational (including for hire) and subsistence fishing sectors. This effort is in response to the urgent need for research consistent with these new definitions and guidelines.

This research not only focuses on the development of an extensive description of fishing communities and the social and economic networks embedded within these communities, but also solicits fishermen's perceptions about various kinds of common management options. The purpose of this is to be able to provide managers with a sense of what types of management options are determined to be more effective than others from the perspective of the fishermen. Some examples of the types of options to be discussed are Marine Protected Areas (MPAs), Individual Fishing Quotas, Seasonal Closures and Limited Entry.

## II. Method of Collection

The data will be collected through individual and group interviews. Those interviewed will include a variety of stakeholders, including commercial, recreational, and subsistence fishermen, owners of packing houses, and key local, state and federal fisheries personnel. As well, business owners directly and indirectly impacted by fishing will be interviewed in order to identify the social and economic networks that exist within and outside of the place-based definition of a fishing community.

## III. Data

*OMB Number:* None.

*Form Number:* None.

*Type of Review:* Regular submission.

*Affected Public:* Business and other for-profit organizations.

*Estimated Number of Respondents:* 500.

*Estimated Time Per Response:* 60 minutes.

*Estimated Total Annual Burden Hours:* 500.

*Estimated Total Annual Cost to Public:* \$0.

## IV. Request for Comments

Comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or

included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: April 9, 2004.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 04-8697 Filed 4-15-04; 8:45 am]

BILLING CODE 3510-22-S

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

[I.D. 040904A]

#### Marine Mammals; File Nos. 226-1752, 116-1742, and 878-1715

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Receipt of applications.

**SUMMARY:** Notice is hereby given that the following applicants have applied in due form for permits to import marine mammals for purposes of public display: Theater of the Sea, 84721 Overseas Highway, Islamorada, Florida 33036 (File No. 226-1752) and Sea World, Inc., 7007 Sea World Drive, Orlando, Florida 32821 (File No. 116-1742). In addition, notice is hereby given that Daniel F. Cowan, M.D., The University of Texas Medical Branch, Galveston, Texas 77555-0555 (File No. 878-1715) has applied in due form for a permit to take parts from species of marine mammals for purposes of scientific research.

**DATES:** Written, telefaxed, or e-mail comments must be received on or before May 17, 2004.

**ADDRESSES:** The application requests and related documents are available for review upon written request or by appointment in the following office(s):

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713-2289; fax (301)713-0376;

File No. 116-1742: Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802-4213; phone (562)980-4001; fax (562)980-4018; and

File Nos. 226-1752 and 878-1715: Southeast Region, NMFS, 9721 Executive Center Drive North, St. Petersburg, FL 33702-2432; phone (727)570-5301; fax (727)570-5320.

Written comments or requests for a public hearing on these requests should

be submitted to the Chief, Permits, Conservation and Education Division, F/PR1, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular amendment request would be appropriate.

Comments may also be submitted by facsimile at (301)713-0376, provided the facsimile is confirmed by hard copy submitted by mail and postmarked no later than the closing date of the comment period.

Comments may also be submitted by e-mail. The mailbox address for providing email comments is *NMFS.Pr1Comments@noaa.gov*. Include in the subject line of the e-mail comment the following document identifier: File No. 226-1752, 116-1742, or 878-1715.

#### FOR FURTHER INFORMATION CONTACT:

Jennifer Skidmore, Jill Lewandowski, or Ruth Johnson, (301)713-2289.

**SUPPLEMENTARY INFORMATION:** The subject permits are requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216), the Fur Seal Act of 1966, as amended (16 U.S.C. 1151 *et seq.*), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222-226).

File No. 226-1752: Theater of the Sea requests authorization to import one male, adult bottlenose dolphin (*Tursiops truncatus*) from West Edmonton Mall, Alberta, Canada to their facility in Islamorada, Florida for the purpose of public display. The receiving facility is: (1) open to the public on regularly scheduled basis with access that is not limited or restricted other than by charging for an admission fee; (2) offers an educational program based on professionally accepted standards of the Alliance for Marine Mammal Parks and Aquariums; and (3) holds an Exhibitor's License, number 58-C-0182, issued by the U.S. Department of Agriculture under the Animal Welfare Act (7 U.S.C. 2131-59).

File No. 116-1742: Sea World, Inc. requests authorization to import one female, adult beluga whale (*Delphinapterus leucas*), identified as "Allua", from the Vancouver Aquarium Marine Science Center, British Columbia, Canada to Sea World of California in San Diego, California. The

applicant requests this import for the purpose of public display. The receiving facility, Sea World of California, 1720 South Shores Road, San Diego, California 92109 is: (1) open to the public on regularly scheduled basis with access that is not limited or restricted other than by charging for an admission fee; (2) offers an educational program based on professionally accepted standards of the AZA and the Alliance for Marine Mammal Parks and Aquariums; and (3) holds an Exhibitor's License, number 93-C-069, issued by the U.S. Department of Agriculture under the Animal Welfare Act (7 U.S.C. 2131-59).

In addition to determining whether these applicants meet the three public display criteria, NMFS must determine whether the applicants have demonstrated that the proposed activity is humane and does not represent any unnecessary risks to the health and welfare of marine mammals; that the proposed activity by itself, or in combination with other activities, will not likely have a significant adverse impact on the species or stock; and that the applicant's expertise, facilities and resources are adequate to accomplish successfully the objectives and activities stated in the application.

File No. 878-1715: Dr. Cowan proposes to acquire, import and export specimen samples (blood, tissue or body fluids) from all marine mammal species (pinnipeds and cetaceans) under NMFS jurisdiction. An unlimited number of samples would be taken from the following: (1) stranded marine mammal carcasses; (2) other legally taken (collected) dead animals, or (3) live stranded marine mammals as part of a program of diagnosis and rehabilitation of live stranded marine mammals. Importation and exportation are requested in order to provide specimens to the international scientific community for consultation of diagnosis. The objective of this permit is to utilize samples to determine the cause of disease or death or of stranding, leading to treatment, for example, in a mass mortality event or of individuals from endangered stocks. The applicant has requested a 5-year permit.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activities proposed are categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of these applications to the Marine Mammal

Commission and its Committee of Scientific Advisors.

Dated: April 12, 2004.

**Stephen L. Leathery,**  
*Chief, Permits, Conservation and Education  
Division, Office of Protected Resources,  
National Marine Fisheries Service.*

[FR Doc. 04-8696 Filed 4-15-04; 8:45 am]

**BILLING CODE 3510-22-S**

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## DEPARTMENT OF DEFENSE

### Office of the Secretary

#### Submission for OMB Review; Comment Request

**ACTION:** Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

**DATES:** Consideration will be given to all comments received by May 17, 2004.

*Title, Form, and OMB Number:*  
Personnel Security Clearance Change Notification; DISCO Form 562; OMB Number 0704-0418.

*Type of Request:* Reinstatement.  
*Number of Respondents:* 11,290.  
*Responses Per Respondent:* 1.  
*Annual Responses:* 225,800.  
*Average Burden Per Response:* 12 minutes.

*Annual Burden Hours:* 45,160.  
*Needs and Uses:* DISCO Form 562 is used by contractors participating in the National Industrial Security Program to report various changes in employee personnel clearance status or identification information, *e.g.*, reinstatements, conversions, terminations, changes in name or other previously submitted information. The execution of the DISCO Form 562 is a factor in making a determination as to whether a contractor employee is eligible to have a security clearance. These requirements are necessary in order to preserve and maintain the security of the United States through establishing standards to prevent the improper disclosure of classified information.

*Affected Public:* Business or other for-profit; not-for-profit institutions.

*Frequency:* On occasion.

*Respondent's Obligation:* Required to obtain or retain benefits.

*OMB Desk Officer:* Ms. Jacqueline Zeiher.

Written comments and recommendations on the proposed information collection should be sent to Ms. Zeiher at the Office of Management

and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

*DOD Clearance Officer:* Mr. Robert Cushing.

Written requests for copies of the information collection proposal should be sent to Mr. Cushing, WHS/ESCD/Information Management Division, 1225 Jefferson Davis Highway, Suite 504, Arlington, VA 22202-4326.

Dated: April 9, 2004.

**L.M. Bynum,**

*Alternate OSD Federal Register Liaison  
Officer, Department of Defense.*

[FR Doc. 04-8654 Filed 4-15-04; 8:45 am]

**BILLING CODE 5001-06-M**

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## DEPARTMENT OF DEFENSE

### Office of the Secretary

#### Education Benefits Board of Actuaries Meeting

**AGENCY:** DoD Education Benefits Board of Actuaries, DoD.

**ACTION:** Notice of meeting.

**SUMMARY:** A meeting of the Board has been scheduled to execute the provisions of Chapter 101, Title 10, United States Code (10 U.S.C. 2006). The Board shall review DoD actuarial methods and assumptions to be used in the valuation of the Department of Defense Education Benefits Fund. Persons desiring to: (1) Attend the DoD Education Benefits Board of Actuaries meeting, or (2) make an oral presentation or submit a written statement for consideration at the meeting, must notify Inger Pettygrove at (703) 696-7413 by July 16, 2004. Notice of this meeting is required under the Federal Advisory Committee Act.

**DATES:** August 20, 2004, 10 a.m. to 1 p.m.

**ADDRESSES:** 4040 N. Fairfax Drive, Suite 270, Arlington, VA 22203.

**FOR FURTHER INFORMATION CONTACT:**  
Inger Pettygrove, DoD Office of the Actuary, 4040 N. Fairfax Drive, Suite 308, Arlington, VA 22203, (703) 696-7413.

Dated: April 12, 2004.

**L.M. Bynum,**

*Alternate OSD Federal Register Liaison  
Officer, Department of Defense.*

[FR Doc. 04-8650 Filed 4-15-04; 8:45 am]

**BILLING CODE 5001-06-M**

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## DEPARTMENT OF DEFENSE

### Office of the Secretary

#### Meeting Notice

**AGENCY:** DoD Retirement Board of Actuaries.

**ACTION:** Notice of meeting.

**SUMMARY:** A meeting of the Board has been scheduled to execute the provisions of chapter 74, title 10, United States Code (10 U.S.C. 1464 *et seq.*). The Board shall review DoD actuarial methods and assumptions to be used in the valuation of the Military Retirement System. Persons desiring to: (1) Attend the DoD Retirement Board of Actuaries meeting, or (2) make an oral presentation or submit a written statement for consideration at the meeting, must notify Inger Pettygrove at (703) 696-7413 by July 16, 2004. Notice of this meeting is required under the Federal Advisory Committee Act.

**DATES:** August 19, 2004, 1 p.m. to 5 p.m.

**ADDRESSES:** 4040 N. Fairfax Drive, Suite 270, Arlington, VA 22203.

**FOR FURTHER INFORMATION CONTACT:**  
Inger Pettygrove, DoD Office of the Actuary, 4040 N. Fairfax Drive, Suite 308, Arlington, VA 22203, (703) 696-7413.

Dated: April 12, 2004.

**L.M. Bynum,**

*Alternate OSD Federal Register Liaison Officer,  
DoD.*

[FR Doc. 04-8651 Filed 4-15-04; 8:45 am]

**BILLING CODE 5001-06-M**

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## DEPARTMENT OF EDUCATION

### Notice of Proposed Information Collection Requests

**AGENCY:** Department of Education.

**SUMMARY:** The Leader, Regulatory Information Management Group, Office of the Chief Information Officer, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

**DATES:** Interested persons are invited to submit comments on or before June 15, 2004.

**SUPPLEMENTARY INFORMATION:** Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process

would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Regulatory Information Management Group, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) title; (3) summary of the collection; (4) description of the need for, and proposed use of, the information; (5) respondents and frequency of collection; and (6) reporting and/or recordkeeping burden. OMB invites public comment. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: April 12, 2004.

**Angela C. Arrington,**  
Leader, Regulatory Information Management  
Group, Office of the Chief Information Officer.

#### Office of Management

*Type of Review:* Reinstatement.

*Title:* Performance Based Data Management Initiative.

*Frequency:* Annually.

*Affected Public:* State, local, or tribal gov't, SEAs or LEAs.

*Reporting and Recordkeeping Hour Burden:*

*Responses:* 66,052.

*Burden Hours:* 288,480.

*Abstract:* The Performance Based Data Management Initiative (PBDMI) is in the first phase of a multiple year effort to consolidate the collection of education information about States, Districts, and Schools in a way that improves data quality and reduces paperwork burden for all of the national education partners.

Requests for copies of the proposed information collection request may be accessed from <http://edicsweb.ed.gov>, by selecting the "Browse Pending Collections" link and by clicking on link number 2529. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to Vivian Reese, Department of Education, 400 Maryland Avenue, SW., Room 4050, Regional Office Building 3,

Washington, DC 20202-4651 or to the e-mail address [vivian\\_reese@ed.gov](mailto:vivian_reese@ed.gov). Requests may also be electronically mailed to the Internet address [OCIO\\_RIMG@ed.gov](mailto:OCIO_RIMG@ed.gov) or faxed to (202) 708-9346. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Joe Schubart at his e-mail address [Joe\\_Schubart@ed.gov](mailto:Joe_Schubart@ed.gov). Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339.

[FR Doc. 04-8617 Filed 4-15-04; 8:45 am]

BILLING CODE 4000-01-P

## DEPARTMENT OF EDUCATION

### National Institute on Disability and Rehabilitation Research (NIDRR); Notice of Extension

**AGENCY:** Office of Special Education and Rehabilitative Services, Department of Education.

**ACTION:** Notice of extension of project period and waiver for the National Center for the Dissemination of Disability Research (NCDDR) Project.

**SUMMARY:** The Secretary waives the requirements in Education Department General Administrative Regulations (EDGAR), at 34 CFR 75.250 and 75.261(a) and (c)(2), respectively, that generally prohibit project periods exceeding 5 years and project period extensions involving the obligation of additional Federal funds. This extension of project period and waiver will enable a Disability and Rehabilitation Research Project (DRRP) that conducts research on issues relating to the dissemination and utilization of research results developed through NIDRR grants and contracts to receive funding from October 1, 2004, until September 30, 2005.

**EFFECTIVE DATE:** This notice is effective May 17, 2004.

#### FOR FURTHER INFORMATION CONTACT:

Donna Nangle, U.S. Department of Education, 400 Maryland Avenue, SW., room 3412, Switzer Building, Washington, DC 20202-2645. Telephone: (202) 205-5880 or via Internet: [donna.nangle@ed.gov](mailto:donna.nangle@ed.gov).

If you use a telecommunications device for the deaf (TDD), you may call the TDD number at (202) 205-4475.

Individuals with disabilities may obtain this document in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

**SUPPLEMENTARY INFORMATION:** NIDRR supports the goals of the President's New Freedom Initiative (NFI) and the National Institute on Disability and Rehabilitation Research Long Range Plan (Plan) to improve rehabilitation services and outcomes for individuals with disabilities.

**Note:** The NFI can be accessed on the Internet at the following site: <http://www.whitehouse.gov/news/freedominitiative/freedominitiative.htm>.

The Plan can be accessed on the Internet at the following site: <http://www.ed.gov/rschstat/research/pubs/index.html>.

In accordance with the goals of the NFI and the Plan, and as authorized under section 204(a)(1) of the Rehabilitation Act of 1973, as amended, through NIDRR, the Department provides funding for projects to improve services and outcomes for individuals with disabilities. In order to foster more efficient use of Federal funds for the DRRP program, the Secretary intends to refocus the priorities for dissemination and utilization of research results and provide funding for new awards in fiscal year (FY) 2005.

The grant for the NCDDR currently administered by the Southwest Educational Development Laboratory, Austin, Texas, is scheduled to expire September 30, 2004. It would be contrary to the public interest, however, to have any lapse in the research and related activities conducted by NCDDR before the refocused priorities can be implemented and new awards granted for FY 2005.

To avoid any lapse in research and related activities before the refocused priorities can be implemented, therefore, the Secretary has decided to fund this project until September 30, 2005. Accordingly, the Secretary waives the requirements in 34 CFR 75.250 and 75.261(a) and (c)(2), which prohibit project periods exceeding 5 years and extensions of project periods that involve the obligation of additional Federal funds.

#### Waiver of Proposed Rulemaking

Under the Administrative Procedure Act (5 U.S.C. 553) the Department generally offers interested parties the opportunity to comment on proposed regulations. However, the waiver of the requirements in 34 CFR 75.250 and 75.261 applicable to the maximum project period and extension of the project period for these grants on a one-time only basis is procedural and does not establish new substantive policy. Therefore, under 5 U.S.C. 553(b)(A), proposed rulemaking is not required.

In addition, given the fact that the additional period of funding is only for

a period of 12 months from the expiration of the existing grant agreement in September 2004, and affects only the potential lapse in funding for the above-mentioned project, the Secretary has determined that proposed rulemaking on this waiver is impracticable, unnecessary, and contrary to the public interest. Thus, proposed rulemaking also is not required under 5 U.S.C. 553(b)(B).

#### Regulatory Flexibility Act Certification

The Secretary certifies that this extension of the project period and waiver will not have a significant economic impact on a substantial number of small entities.

**Electronic Access to This Document:** You may view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: <http://www.ed.gov/news/fedregister>.

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1-888-293-6498; or in the Washington, DC, area at (202) 512-1530.

**Note:** The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: <http://www.gpoaccess.gov/nara/index.html>.

(Catalog of Federal Domestic Assistance Number 84.133A, Disability Rehabilitation Research Project.)

**Program Authority:** 29 U.S.C. 762(g) and 764(a).

Dated: April 12, 2004.

**Troy R. Justesen,**

*Acting Deputy Assistant, Secretary for Special Education and Rehabilitative Services.*

[FR Doc. 04-8706 Filed 4-15-04; 8:45 am]

**BILLING CODE 4000-01-P**

## DEPARTMENT OF ENERGY

[Docket No. EA-97-C]

### Application To Export Electric Energy; Portland General Electric Company

**AGENCY:** Office of Fossil Energy, DOE.

**ACTION:** Notice of application.

**SUMMARY:** Portland General Electric Company ("PGE") has applied for renewal of its authority to transmit electric energy from the United States to Canada pursuant to section 202(e) of the Federal Power Act.

**DATES:** Comments, protests or requests to intervene must be submitted on or before May 17, 2004.

**ADDRESSES:** Comments, protests or requests to intervene should be addressed as follows: Office of Coal & Power Import/Export (FE-27), Office of Fossil Energy, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585-0350 (fax 202-287-5736).

#### FOR FURTHER INFORMATION CONTACT:

Rosalind Carter (Program Office), 202-586-67983 or Michael Skinker (Program Attorney), 202-586-2793.

**SUPPLEMENTARY INFORMATION:** Exports of electricity from the United States to a foreign country are regulated and require authorization under section 202(e) of the Federal Power Act (FPA) (16 U.S.C. 824a(e)).

On April 29, 1994, the Office of Fossil Energy (FE) of the Department of Energy (DOE) authorized PGE to transmit electric energy from the United States to Canada using the international transmission facilities of the Bonneville Power Administration. Amendments to this authorization were granted on February 9, 1996 (Order EA-97-A), and again on March 5, 1998 (Order EA-97-B). Order EA-97-B expired on March 5, 2003.

On February 26, 2004, PGE filed an application with FE for renewal of its export authority and requested that the maximum rate of transmission of its exports be increased from 400 megawatts (MW) to 600 MW and that the authorization be granted for a 10-year period beginning on April 1, 2003.

PGE asserted that it was not able to apply for a renewal of its export authorization before the expiration of Order EA-97-B due to numerous factors, including disruptions to routine filing and reporting obligations resulting from the bankruptcy reorganization of PGE's parent company, Enron. PGE also indicated that it had continued to export electricity to Canada after the expiration date of Order EA-97-B.

**Procedural Matters:** Any person desiring to become a party to this proceeding or to be heard by filing comments or protests to this application should file a petition to intervene, comment or protest at the address provided above in accordance with §§ 385.211 or 385.214 of the FERC's Rules of Practice and Procedures (18 CFR 385.211, 385.214). Fifteen copies of each petition and protest should be filed with the DOE on or before the date listed above.

Comments on the PGE application to export electric energy to Canada should be clearly marked with Docket EA-97-

C. Additional copies are to be filed directly with Ms. Loretta Mabinton, Assistant General Counsel, Portland General Electric Company, 121 SW. Salmon Street, Portland, OR 97204.

DOE notes that the circumstances described in this application are virtually identical to those for which export authority had previously been granted in FE Orders EA-97. Consequently, DOE believes that it has adequately satisfied its responsibilities under the National Environmental Policy Act of 1969 through the documentation of a categorical exclusion in the FE Docket EA-97 proceeding.

Copies of this application will be made available, upon request, for public inspection and copying at the address provided above or by accessing the Fossil Energy home page at <http://www.fe.doe.gov>. Upon reaching the Fossil Energy home page, select "Electricity Regulation," and then "Pending Proceedings" from the options menus.

Issued in Washington, DC, on April 5, 2004.

**Anthony J. Como,**

*Deputy Director, Electric Power Regulation, Office of Coal & Power Import/Export, Office of Coal & Power Systems, Office of Fossil Energy.*

[FR Doc. 04-8652 Filed 4-15-04; 8:45 am]

**BILLING CODE 6450-01-P**

## DEPARTMENT OF ENERGY

### Recommendations for Sequencing Targets in Support of the Science Missions of the Office of Biological and Environmental Research (BER)

**AGENCY:** Office of Science; Office of Biological and Environmental Research; U.S. Department of Energy (DOE).

**ACTION:** Notice of recommendations for sequencing targets.

**SUMMARY:** This **Federal Register** notice seeks the input and nominations of interested parties for candidate microbes, microbial consortia, and 250Mb-or-less-sized organisms for draft genomic sequencing in support of Office of Biological and Environmental Research (BER) programs, among them, the Climate Change Research Program, the Natural and Accelerated Bioremediation Research (NABIR) Program, the Environmental Management Science Program (EMSP), the Microbial Genome Program (MGP), the Ocean Science Program, and the Genomics: GTL Program. Nominated candidates should be relevant to DOE mission needs, e.g., organisms involved

in environmental processes, including waste remediation, carbon management, and energy production. This announcement is not an offer of direct financial support for research on these organisms. Those nominations selected will result in the DNA sequence of selected organisms being determined at a draft level (6–8 X coverage) at the DOE Production Genomics Facility (PGF) at the Joint Genome Institute (JGI), (<http://www.jgi.doe.gov>). A subset of the selected organisms may be identified for sequence finishing. This announcement is designed to assist DOE in determining and prioritizing a list of microbes, microbial consortia, or modest-genome sized (not more than 250Mb) organisms (including eukaryotes) that address DOE mission needs. Following merit review, and subject to the availability of funding and programmatic relevance, draft sequencing will be carried out at the PGF.

**DATES:** To assure consideration, nominations in response to this notice should be received by 4:30 p.m. (e.d.t.), July 1, 2004, to be accepted for merit review. It is anticipated that review will be completed early in the fall of 2004 with draft sequencing at the DOE PGF to commence in early 2005, conditional upon the provision of high quality DNA.

**ADDRESSES:** Nominations responding to this notice should be sent to Dr. Daniel W. Drell, Office of Biological and Environmental Research, SC-72, Office of Science, U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585-1290; e-mail is acceptable and encouraged for submitting nominations using the following addresses: [kim.laing@science.doe.gov](mailto:kim.laing@science.doe.gov) and [daniel.drell@science.doe.gov](mailto:daniel.drell@science.doe.gov).

**FOR FURTHER INFORMATION CONTACT:** Dr. Daniel W. Drell, SC-72, Office of Biological and Environmental Research, Office of Science, U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585-1290, phone: (301) 903-4742, e-mail: [daniel.drell@science.doe.gov](mailto:daniel.drell@science.doe.gov). The full text of this notice is available via the Internet using the following Web site address: <http://www.sc.doe.gov/ober/microbial.html>.

**SUPPLEMENTARY INFORMATION:** The DOE Office of Biological and Environmental Research supports fundamental research in a variety of missions ([http://www.sc.doe.gov/ober/ober\\_top.html](http://www.sc.doe.gov/ober/ober_top.html)). Relevant BER programs may include the Climate Change Research Program, the Natural and Accelerated Bioremediation Research (NABIR) Program, the Environmental Management Science

Program (EMSP), the Microbial Genome Program (MGP), the Ocean Science Program, and the Genomics:GTL Program. The Climate Change Research Program supports investigations of microbially-mediated fixation of atmospheric CO<sub>2</sub>. The NABIR Program supports research on microbial biotransformations and/or immobilization of metal and radionuclide wastes. The EMSP supports research into microbially-mediated biotransformations of DOE-relevant organic wastes such as chlorinated solvents. The MGP supports key DOE missions by providing and analyzing microbial DNA sequence information to further the understanding and application of microbiology relating to energy production, chemical and materials production, environmental carbon management, and environmental cleanup. The Ocean Science Program supports research in two areas, (1) the role of oceans in sequestration of atmospheric CO<sub>2</sub>, and (2) the use of biotechnological tools to determine linkages between carbon and nitrogen cycling in coastal environments. The Genomics:GTL Program builds on the successes of the DOE Human Genome Program (HGP) by seeking to understand biological function in DOE mission relevant microbes with emphases on identifying the multi-component protein complexes in cells, characterizing gene regulatory networks, probing the functional capabilities of the environmental microbial repertoire of genes, and beginning to model these processes computationally. Both terrestrial and ocean environments in which microbial flora sequester carbon, particularly carbon dioxide, are of interest. Within the ocean environment, microbial flora that sequester or process carbon dioxide in both the eutrophic and "twilight" zones are of interest.

Over the last ten years, sequencing of a range of microorganisms that live in a wide diversity of environments has provided a considerable information base for scientific research related not only to DOE missions, but also to other federal agency missions and U.S. industry. (<http://www.tigr.org/tdb/mdb/mdbcomplete.html> <http://www.ornl.gov/microbialgenomes/organisms.html> and [http://www.jgi.doe.gov/JGI\\_microbial/html/](http://www.jgi.doe.gov/JGI_microbial/html/)). Nonetheless, most of our current knowledge of microbiology still is derived from individual species that either cause disease or grow easily and readily as monocultures under laboratory conditions and are thus easy to study. The preponderance of species in the environment remains largely

unknown to science. Many are thought to grow as part of interdependent consortia in which one species supplies a nutrient necessary for the growth of another. Little is known of the organization, membership, or functioning of these consortia, especially those involved in environmental processes of DOE interest. Fungi and small multicellular eukaryotes play important roles in the environment as well.

Genomic analyses of sequenced microbes have suggested that processes such as lateral gene transfers at various times in the evolutionary history of some microbial lineages may have blurred the understanding of their phylogenetic relationships. For this notice, groups of microbes that may have exchanged (or may be exchanging) genetic information via lateral gene exchange or plasmid mediated exchanges can be proposed if the processes of genetic exchange result in functions relevant to DOE missions noted above.

Genomic analyses are badly needed of microbial consortia and species refractory to laboratory culture that play important roles in environments challenged with metals, radionuclides, chlorinated solvents, or are involved in carbon sequestration. The candidate(s) being proposed must mediate or catalyze metabolic events of energy or environmental importance. Priority will be given to studies on those microbes or microbial consortia that can bioremediate metals and radionuclides, degrade significant biopolymers such as celluloses and lignins, produce potentially useful energy-related materials (H<sub>2</sub>, CH<sub>4</sub>, ethanol, *etc.*), or fix or sequester CO<sub>2</sub>.

For this notice, candidate organisms (either individual organisms, consortia of organisms, or eukaryotes with small genomes) comprised of archaea, bacteria, fungi, algae, and other eukaryotes with genome sizes not greater than 250 Mbp can be proposed for draft sequencing. For a current list of microbes that have been and are being sequenced see <http://www.ornl.gov/microbialgenomes/organisms.html> and <http://www.ornl.gov/microbialgenomes/seq2003.html>.

**Aims:** This request for nominations of candidate sequencing targets has two broad foci:

(1) *Single organisms.* These may be bacteria, archaea, fungi, microalgae or multicellular organisms with genomes not larger than 250Mb. The criteria that will be used to evaluate proposed candidates for draft sequencing will include:

(a) The candidate has significant relevance to the DOE missions noted above;

(b) To assess suitability for whole genome shotgun sequencing, preliminary data on genome size, repeat content, genome structure, GC content, polymorphism, and other characteristics are provided, especially for larger genomes;

(c) The source of genomic DNA (*i.e.*, strain or isolate, and researcher) is identified, and a clonal sample (or samples with low and characterized polymorphism) are available;

(d) A brief description of post sequencing follow-up work (*e.g.*, a data use plan and how will data be annotated to enable rapid and open use) is included;

(e) The availability of a DNA/gene transfer system supporting genetic analyses is known;

(f) Biological novelty or uniqueness (*i.e.*, unusual genetically determined characteristics pertinent to DOE missions) is described;

(g) Place in the currently understood, 16s RNA based, "Tree of Life" is identified, *e.g.*, is the proposed candidate in a sparsely populated or more heavily populated section of the tree?

(h) A brief description of the user community is given;

(i) The potential impact on the scientific community is large;

(j) Explicit commitment to a data-release schedule, consistent with the guidelines given below is provided.

(2) *Currently unculturable or hard-to-culture organisms and environmental consortia.* The review criteria that will be used to evaluate proposed candidates for draft sequencing will include most of the criteria listed above for single organisms (with less emphasis on genome size/structure, presence/absence of a genetic system, or position in the "Tree of Life" since it is recognized that few data on these attributes will be available), but in addition, the following considerations will be included:

(a) Some measure of the "complexity" of the target consortium being proposed, *e.g.*, approximate number of species, size(s) of genomes, and proportions of different members (it is understood that in most cases, only estimates of these parameters may be available) is discussed. When the environmental consortia are complex, approaches should be described to normalize the DNA libraries in order to reduce the amount of sequencing required and assure adequate sampling of the complexity of the consortia. Additionally, the proposer(s) should be

prepared to work together with JGI scientists to optimize the yield from the sequencing effort required;

(b) Past attempts to cultivate consortium members are described, *e.g.*, have any members of this consortium been successfully cultured;

(c) Some spatial/temporal/hydrochemical/geochemical or other characterization of the environment is given, *e.g.*, the physicochemical parameters of the site from which the selected community is derived; a description of the site contaminants; the accessibility of the site for future sampling; the adequacy of site documentation;

(d) If proposed, technical approaches and technology development specific for defining and isolating members of a given consortium are described;

(e) Some indication of the biological function of the relationships, within consortium members where available, along with a discussion of the scientific and programmatic importance of understanding these relationships is given;

(f) Information where available is given about the phylogenetic position(s) of the members of the consortium and what is known about closely related organisms.

(g) Available informatics tools and annotation plan (*e.g.*, for annotating genes from a consortium analysis or grouping identified genes into a putative "consortium phenotype" within the chosen environment) are described;

(h) Explicit commitment to a data-release schedule, consistent with the guidelines given below is provided.

Scientific community standards regarding access to sequencing data are evolving. BER conforms to the general guidance contained within the Draft Rapid Data Release Policy (<http://www.genome.gov/page.cfm?pageID=10506537>) for "community resource projects." The usual and customary practice for the JGI is to put all sequencing data up on its Web site (<http://www.jgi.doe.gov/>) at frequent and periodic intervals.

However, for the purposes of this notice, BER does not regard individual genome sequencing efforts involving less than 250Mb, or microbial community sequencing efforts, as requested herein, as "community resource projects" within the definition of the Draft Rapid Data Release policy. BER's position, which is provisional and subject to evolution, is that no more than 6 months from the completion of a "first assembly" of the sequence for a single-genome project, the data will be released on the JGI web site or to a publicly accessible database with no use

restrictions. For microbial community projects, the JGI will conduct normal QA/QC assessments on the sequence output (at approximately 2 x coverage), then discuss with the proposer(s) and with BER staff the extent to which sequencing will be continued to achieve a satisfactory genomic "view" of the selected microbial community. From the time of initiation of this discussion, not more than 6 months will be permitted to elapse before unconditional release of these data. Proposers should clearly understand that the priority in the sequencing queue that a selected project is given may be linked to the willingness of the proposer(s) to shorten this "embargo" period. BER is fully aware that some ambiguity remains in the precise initiation of this embargo period but stresses its intention and commitment to the rapid release, without any use restrictions, of this data into publicly accessible databases.

Upon selection of a nominated microbial sequencing target, BER expects that Principal Investigators will collaborate with the JGI by providing high quality, high MW genomic DNA for library construction as well as assisting in annotating the draft sequence data until a sufficiently complete annotation is achieved, understanding that this will be sensitive to hypothetical gene predictions and the usual uncertainties of annotation. (A separate communication with the detailed requirements for DNA will be sent to proposers whose nominations are accepted for sequencing.) Following data acquisition and annotation, DOE expects that those whose nominations have been sequenced will make good faith efforts to publish in the open scientific literature the results of their subsequent work, including both the genome sequences of the organisms sequenced under this notice as well as the annotation. (BER also expects the Principal Investigator of a selected effort to either deposit a culture of the microbe or consortium into a publicly accessible collection or repository, or make it available directly so others can have access.) These parties are encouraged to create process- and cost-effective partnerships that will maximize data production and analysis, data dissemination, and progress towards understanding basic biological mechanisms that can further the aims of this effort. Additionally, it must be explicitly understood that DOE will provide an assembled and computationally annotated draft (roughly 6 x; carried out in a paired-end sequencing approach) sequence of the microbe(s) selected, but that research

using that sequence data should be funded from separate sources and/or separate solicitations. Finally, there is no commitment to finish a given drafted sequence, although this option may be considered at a later time for a selected subset of proposed candidates.

**Submission Information:** Interested parties should submit a brief white paper to either of the foci given above, consisting of not more than 5 pages of narrative exclusive of attachments (which should be kept to a minimum) responding to each of the specific criteria set forth. Electronic submission (to [kim.laing@science.doe.gov](mailto:kim.laing@science.doe.gov) and [Daniel.drell@science.doe.gov](mailto:Daniel.drell@science.doe.gov)) is strongly encouraged. It is expected that the Principal Investigator will serve as the main point of contact for additional information on the nominated microbe. Nominations must contain a very short abstract or project summary and a cover page with the name of the applicant, mailing address, phone, fax, and e-mail. The nomination should include 2-page curriculum vitae of the key investigators; letters of intent (or e-mails) from collaborators (suggesting the size of the interested community) are permitted.

Nominations will be reviewed relative to the scope and research needs of the BER programs cited above. A brief response to each nomination will be provided electronically following merit and programmatic reviews.

Other useful Web sites include:

DOE JGI Microbial Sequencing Priorities for FY2004: <http://www.ornl.gov/microbialgenomes/seq2003.html>; [http://www.jgi.doe.gov/JGI\\_microbial/html/coming\\_soon.html](http://www.jgi.doe.gov/JGI_microbial/html/coming_soon.html);

Microbial Genome Program Home Page—<http://www.sc.doe.gov/ober/microbial.html>;

DOE Joint Genome Institute Microbial Web Page—[http://www.jgi.doe.gov/JGI\\_microbial/html/](http://www.jgi.doe.gov/JGI_microbial/html/);

GenBank Home Page—<http://www.ncbi.nlm.nih.gov/>;

Human Genome Home Page—<http://www.ornl.gov/hgmis/>;

DOE Genomes to Life—<http://DOEGenomesToLife.org>;

DOE Natural and Accelerated Bioremediation Research (NABIR) Program—<http://www.lbl.gov/nabir/>;

Ocean Science Program—<http://www.sc.doe.gov/ober/CCRD/oceans.html>.

Issued in Washington, DC, April 12, 2004.

**Marvin E. Frazier,**

*Director, Life Sciences Division.*

[FR Doc. 04-8653 Filed 4-15-04; 8:45 am]

BILLING CODE 6450-01-P

## ENVIRONMENTAL PROTECTION AGENCY

[ER-FRL-6650-4]

### Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared pursuant to the Environmental Review Process (ERP), under Section 309 of the Clean Air Act and Section 102(2)(c) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at (202) 564-7167. An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in FR dated April 02, 2004 (69 FR 17403).

#### Draft EISs

*ERP No. D-AFS-K65266-AZ* Rating LO, Arizona Snowbowl Facilities Improvements, Proposal to Provide a Consistent/Reliable Operating Season, Coconino National Forest, Coconino County, AZ.

Summary: While EPA had no objections to the plan as proposed, EPA did request clarification on Tribe consultation and mitigation of erosion and air quality impacts associated with construction.

*ERP No. D-BIA-J60021-UT* Rating EC2, Tekoi Balefill Project on the Skull Valley Band of Goshute Indians Reservation, Approval of Long-Term Lease of Indian Land for a Commercial Solid Waste Disposal Facility, Salt Lake City, Tooele County, UT.

Summary: EPA expressed concerns regarding environmental oversight of the landfill during design, construction, operation, and closure. Although the landfill will be regulated under RCRA, there are no provision for Tribes to develop approved RCRA municipal solid waste programs to permit and oversee the landfill. Additional information is also needed regarding faults at the proposed site and groundwater availability.

*ERP No. D-FHW-E40799-TN* Rating EC2, Appalachian Development Highway System Corridor K (Relocated Highway U. S. 64), Improvements from West of the Ocoee River to TN-68 near Ducktown, Funding, U.S. Army Corps Section 10 and 404 Permits, Polk County, TN.

Summary: EPA expressed concerns regarding the potential of the project to further degrade water quality and aquatic habitat in the Ocoee River watershed.

*ERP No. D-FHW-H40182-00* Rating LO, US-159 Missouri River Crossing

Project, Rehabilitate or Replace the Missouri River Bridge at Rulo, Funding and U.S. Army COE Section 404 Permit, Richardson County, NE and Holt County, MO.

Summary: EPA has no objection to the proposed project. However, EPA does request clarification on the type of bridge configuration that the build alternative would employ as well as the potential impact to wildlife movement and habitat use within the riparian section of the floodplain. EPA also requests that the Memorandum of Agreement between the NDOR and SHPO be included in the FEIS.

*ERP No. DB-NOA-G64002-00* Rating LO, Reef Fish Management Plan Amendment 22, To Set Red Snapper Sustainable Fisheries Act Targets and Thresholds, Set a Rebuilding Plan, and Establish Bycatch Reporting Methodologies for the Reef Fish Fishery, Gulf of Mexico.

Summary: While EPA has no objections to the proposed action, EPA recommended that the red snapper bycatch issue associated with the shrimp fishery be addressed in future amendments to the shrimp FMP.

#### Final EISs

*ERP No. F-AFS-J65371-WY* Medicine Bow National Forest Revised Draft Land and Resource Management Plan, Implementation, Albany, Carbon and Laramie Counties, WY.

Summary: EPA continues to express concerns regarding potential adverse impacts to aquatic and soil resources.

*ERP No. F-FHW-J40156-ND* US 2 Highway Transportation Improvements from near U.S. 85 (milepost 31.93) to west of U.S. 52 (milepost 131.24), Funding, NPDES and U.S. Army COE Section 404 Permits Issuance, Williams, Mountrail and Ward Counties, ND.

Summary: EPA continues to express environmental concerns with the proposed project due to wetland and aquatic resource impacts and the limited details regarding mitigation for these impacts.

*ERP No. F-NRC-E06022-SC* Generic—License Renewal of Nuclear Plants, Virgil C. Summer Nuclear Station, Supplement 15, Fairfield County, SC.

Summary: EPA continues to have concerns and recommended that the project assure that there is radiological monitoring of all plant effluents, and that there is appropriate storage and disposition of radioactive waste.

Dated: April 13, 2004.

**Ken Mittelholtz,**

*Environmental Protection Specialist, Office of Federal Activities.*

[FR Doc. 04-8671 Filed 4-15-04; 8:45 am]

BILLING CODE 6560-50-P

## ENVIRONMENTAL PROTECTION AGENCY

[ER-FRL-6650-3]

### Environmental Impact Statements; Notice of Availability

*Responsible Agency:* Office of Federal Activities, General Information, (202) 564-7167 or <http://www.epa.gov/compliance/nepa/>.

Weekly receipt of Environmental Impact Statements

Filed April 5, 2004, through April 9, 2004

Pursuant to 40 CFR 1506.9.

EIS No. 040163, Final Supplement, COE, FL, Phipps Ocean Park Beach Restoration Project to Provide Shore Protection for the Shoreline surrounding Phipps Ocean Park within the Town of Palm Beach, Regulatory Authorization and U.S. Army COE Section 10 and 404 Section Permits Issuance, Palm Beach County, FL, Wait Period Ends: May 17, 2004, Contact: Penny Cutt (561) 472-3505.

This document is available on the Internet at: [http://www.saj.usace.mil/permit/hot\\_topics/PhippsEIS/Phippsindex.htm](http://www.saj.usace.mil/permit/hot_topics/PhippsEIS/Phippsindex.htm).

EIS No. 040164, FINAL EIS, IBR, CA, Freeport Regional Water Project, To Construct and Operate a Water Supply Project to Meet Regional Water Supply Needs, Sacramento County Water Agency (SCWA) and the East Bay Municipal Utility District (EBMUD), Alameda, Contra Costa, San Joaquin, Sacramento Counties, CA, Wait Period Ends: May 17, 2004, Contact: Rob Schroeder (916) 989-7274.

EIS No. 040165, FINAL EIS, NPS, AZ, Coronado National Memorial General Management Plan, Implementation, Cochise County, AZ, Wait Period Ends: May 17, 2004, Contact: John Paige (303) 969-2356.

EIS No. 040166, FINAL EIS, AFS, CO, Arapaho National Recreation Area Forest Health and Fuels Reduction Project, Pre-Suppression Measures for Mountain Pine Beetle Infestation Reduction in Stands of Lodgepole Pine, Implementation, Arapaho National Forest, Sulphur Ranger District, Grand County, CO, Wait Period Ends: May 17, 2004, Contact: Rick Caissie (970) 887-4112.

This document is available on the Internet at: <http://www.mt.blm.gov/dfo/rmp>.

EIS No. 040167, DRAFT SUPPLEMENT, COE, CA, U.S. Army National Training Center, Proposed Addition of Maneuver Training Land at Fort Irwin, Implementation, San Bernardino County, CA, Comment Period Ends: July 16, 2004, Contact: Ray Marler (760) 380-3035.

EIS No. 040168, DRAFT SUPPLEMENT, AFS, ID, Clean Slate Ecosystem Management Project, Aquatic and Terrestrial Restoration, Updated Information, Alternatives for the Identifies Unroaded Areas, Nez Perce National Forest, Salmon River Ranger District, Idaho County, ID, Comment Period Ends: June 1, 2004, Contact: Mick McGee (208) 983-1963.

EIS No. 040169, FINAL EIS, AFS, PA, Sugar Run Project Area (SRPA), To Achieve and Maintain the Desired Conditions as stated in Forest Plan, Allegheny National Forest, Bradford Ranger District, McKean County, PA, Wait Period Ends: May 17, 2004, Contact: Heather Whittier (814) 362-4613.

EIS No. 040170, DRAFT EIS, NOA, WA, OR, Puget Sound Chinook Harvest Resource Management Plan (RMP) 2004-2009, Implementation, Endangered Species Act, OR and WA, Comment Period Ends: June 1, 2004, Contact: Susan Bishop (206) 526-4587.

EIS No. 040171, DRAFT EIS, AFS, UT, State of Utah School and Institutional Trust Lands Administration (SITLA) Access Route on East Mountain, National Forest System Lands Administered by Manti-La Sal National Forest, Ferron/Price Ranger District, Emery Counties, UT, Comment Period Ends: June 1, 2004, Contact: Leland Matheson (435) 636-3500.

EIS No. 040172, FINAL EIS, IBR, NM, City of Albuquerque Drinking Water Project to Provide a Sustainable Water Supply for Albuquerque through Direct and Full Consumptive Use of the City's San Juan-Chama (SJC) Water for Potable Purposes, Funding, Right-of-Way Grant and U.S. Army COE Section 404 Permit Issuance, City of Albuquerque, NM, Wait Period Ends: May 17, 2004, Contact: Marsha Carra (505) 462-3602.

Dated: April 13, 2004.

**Ken Mittelholtz,**

*Environmental Protection Specialist, Office of Federal Activities.*

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## ENVIRONMENTAL PROTECTION AGENCY

[FRL-7648-9]

### Environmental Protection Agency, Office of the Administrator, Office of Children's Health Protection, Aging Initiative

*Solicitation Title:* Protecting the Health of Older Adults by Improving the Environment: Training, Innovation, Outreach and Educational Projects; Initial Announcement.

*Funding Opportunity Number:* USEPA-AO-OCHP-04-01.

*CFDA Number:* 66.609 Office of Children and the Aging, Aging Initiative Fiscal Year 2004, Environmental Protection Agency, deadline for the pre-application, June 28, 2004; All applicants must submit a pre-application to be considered for an award.

*Solicitation closing date:* September 20, 2004, for full proposals invited by EPA.

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#### Overview

##### A. Summary

The EPA Aging Initiative announces a new grant and cooperative agreement opportunity for Protecting the Health of Older Adults by Improving the Environment: Training, Innovation, Outreach and Educational Projects. Projects must accomplish one of the following five goals: (1) Train older adults, retirees and semi-retirees, to be environmental leaders in their community; (2) Demonstrate new or experimental technologies, methods, or approaches that reduce exposure to environmental health hazards; (3) Build state, local and tribal capacity to protect the health of older adults from environmental hazards; (4) Develop and implement outreach and educational strategies that reduce exposure to environmental health hazards; (5) Demonstrate how smart growth activities can improve the quality of life for older adults while improving environmental quality. Cost sharing or matching contributions are not required. Funds available for these projects are

expected to total approximately \$200,000. Training, innovation, and outreach projects should address one or more of the following objectives:

- Implement effective leadership training programs for older adults including retirees and semi-retirees to be environmental leaders to address environmental health hazards in their communities.
- Demonstrate new or experimental technologies on risk-reduction strategies on environmental health hazards to older adults.
- Conduct outreach and educational intergenerational programs that engage older adults and children to reduce environmental health hazards in their communities.
- Build state, local and tribal capacity through coordinated efforts by aging, health and the environmental agencies to protect the health of older adults from environmental hazards.
- Demonstrate how smart growth activities can be incorporated in communities to improve the quality of life for older adults while improving environmental quality.

#### B. Authorities

To be eligible to compete for these funds, applicants must be eligible under at least one of these authorities: Clean Air Act Section 103 (b)(3); Clean Water Act, Section 104(b)(3); Federal Insecticide, Fungicide, and Rodenticide Act Section 20; Solid Waste Disposal Act Section 8001; Safe Drinking Water Act, Section 1442; and Toxic Substances Control Act, Section 10.

#### C. Background

By 2030, the number of older adults is expected to double to more than 70 million. The nation's older population can be particularly susceptible to health related effects from pollution. For example, research indicates ground level ozone or smog poses a serious health threat for vulnerable populations, including older adults. Surface water runoff can impair drinking water quality and engender harmful health impacts on older adults particularly if they have compromised immune systems. In addition to these health risks, aging adults may have different needs for housing, recreation, health care, and transportation. These needs will increase with the growth of this population, and must be addressed in a manner that will both promote the health of individuals and the environment. EPA's efforts to address environmental issues that affect the health and well-being of the nation's elders have been advanced by a workshop on the "Differential

Susceptibility and Exposure of Older Persons to Environmental Hazards" convened by the National Academy of Sciences in December 2002. Public input provided through oral comments from concerned citizens at public listening sessions, meetings, and submitted written comments have contributed to the development of this solicitation.

Many older adults contribute time, energy and expertise to their communities. The U.S. Department of Labor reports that older adults volunteer twice the time of any other age group in their community.<sup>1</sup> EPA encourages the emerging generation of older adults to address environmental concerns in their communities. The participation of older adults is a key element in the EPA's Aging Initiative. EPA believes that retired and semi-retired older adults will be eager to play a central role in protecting the environment and educating their communities and younger generations about environmental hazards that may threaten natural resources and endanger public health. EPA intends to expand and create opportunities for older persons to identify environmental health hazards and environmental needs in their communities. Programs or activities to increase awareness of environmental hazards and their effects on public health will be encouraged. Older adults have the experience, commitment and concern for their environment that will not only preserve the quality of the environment but also the interest in working with younger generations to safeguard their health from environmental hazards. While many organizations respond to community needs, existing and new partnerships between state, local and tribal governments, together with non-profit aging, environmental, health, educational and faith-based organizations are needed to improve the environment.

This solicitation will provide information and suggest effective strategies to protect the quality of life for older persons from environmental hazards. Pre-retirees and retirees will play a critical role in this effort. It is expected that many communities will develop outreach and educational intergenerational programs that reduce environmental hazards and improve the environment. According to data from the 2000 Census, 2.4 million grandparents are now the primary

<sup>1</sup> United States Department of Labor, December 17, 2003, news release, Volunteering in the United States. Data on volunteering was collected through a supplement to the September 2003 Current Population Survey (CPS).

caregivers for their grandchildren and children of relatives. The EPA suggests that projects that involve grandparents and grandchildren are appropriate in strengthening bonds within families while acting responsibly for the benefit of the entire community.

Older persons are a vulnerable population with respect to air and water pollution, and research has demonstrated links between development and environmental degradation. Increases in impervious surfaces result in more storm water runoff that directly enters surface waters without being filtered through the soil, potentially contributing to pollution in drinking water. Increasing distances between where people live, work, and shop can contribute to increases in air pollution associated with longer trips.

Opportunities to address these environmental problems and create quality of life benefits for older adults are increased through smart growth practices such as mixing housing types within a community, creating walkable communities, and providing a range of transportation choices. A range of housing types and sizes can make efficient use of land, reduce impervious surface cover, and provide older adults with housing options that meet their needs as they change over time. Communities that offer amenities such as drug stores, libraries, grocery stores and restaurants within walking distance of homes or which are accessible by public transit can shorten vehicle trips and reduce emissions while also providing access, mobility, and independence for those citizens who have difficulty driving. Smart growth practices provide choices that both protect the environment and help people maintain their independence as they age, resulting in environmental benefits and enhanced quality of life.

#### D. Important Dates

(1) All questions must be submitted in writing no later than June 18, 2004 to the following address

[aging.info@epa.gov](mailto:aging.info@epa.gov). Questions and responses will be posted at: [www.epa.gov/aging/grants.htm](http://www.epa.gov/aging/grants.htm).

(2) Deadline for pre-application, June 28, 2004.

(3) EPA will notify applicants eligible to proceed with submitting a full proposal on or before August 16, 2004.

(4) Deadline for submission of full proposals: September 20, 2004.

#### Section I. Funding Opportunity Description

##### A. Funding Priorities

This solicitation will support efforts to protect the health of older adults and

the environment. This is an initial announcement for Protecting the Health of Older Adults by Improving the Environment: Training, Innovation, Outreach and Educational Projects. It is expected that these funds will assist in building local, state or tribal capacity to reduce environmental hazards that may affect the health of older persons. EPA expects to award these grants under the following six grant authorities: Clean Air Act section 103(b)(3); Clean Water Act section 104 (b)(3); Resource Conservation and Recovery Act section 8001; Toxics Substances Control Act section 10; Federal Insecticide, Fungicide, and Rodenticide Act section 20; and Safe Drinking Water Act sections 1442(a) and (c). In addition to the program criteria listed below, a proposal must meet the following two important threshold criteria to be considered for funding:

**Threshold Criterion #1.** A project must consist of activities authorized under one or more of the six EPA grant authorities cited above. Most of the statutes authorize grants for the following activities: "research, investigations, experiments, training, demonstrations, surveys and studies." These activities relate generally to the gathering or transferring of information or advancing the state of knowledge. Grant proposals should emphasize this "learning" concept, as opposed to "fixing" an environmental problem via a well-established method. For example, a proposal to plant some trees in an economically depressed area in order to prevent erosion would probably not in itself fall within the statutory terms "research, studies, demonstrations," etc., nor would a proposal to start a routine recycling program. The project's activities must advance the state of knowledge or transfer information. The statutory term "demonstration" can encompass the first instance of the application of pollution control and prevention techniques, or an innovative application of a previously used method. The term "research" may include the application of established practices when they contribute to "learning" about an environmental concept or problem.

**Threshold Criterion #2.** In order to be funded, a project's focus generally must be one that is specified in the statutes listed above. For most of the statutes, a project must address the causes, effects, extent, prevention, reduction, and elimination of air, water, or solid/hazardous waste pollution, or, in the case of grants under the Toxic Substances Control Act or the Federal Insecticide, Fungicide and Rodenticide Act, to "carrying out the purposes of the

Act." The overarching concern or principal focus must be on the statutory purpose of the applicable grant authority, in most cases "to prevent or control pollution." In light of this, proposals relating to other topics which are sometimes included within the term "environment" such as recreation, conservation, restoration, protection of wildlife habitats, etc., should describe the relationship of these topics to the statutorily required purpose of pollution prevention and/or control. Proposals are encouraged under any of the categories described below. Products may include, but are not limited to, policy papers, case studies, workshops, educational materials, or on-site demonstrations. Grants or cooperative agreements will be considered in following categories: Projects that (1) Develop and implement outreach programs and educational strategies for risk reduction of environmental health hazards to older adults; (2) Foster development of civic engagement programs by older adults to address environmental hazards; (3) Engage socioeconomically disadvantaged elders in health promotion activities related to the environment; (4) Conduct outreach and educational intergenerational projects that address improve environmental quality and public health; and (5) Promote healthy communities for older adults through smart growth activities.

**Threshold Criterion #3.** Proposals must address one of the five following funding priorities.

**(1) Implement Effective Training Programs for Older Adults To Be Environmental Leaders in Their Communities (Grants)**

Possible areas for activities include but are not limited to: Establish academic institutional programs that train older adults, retirees and semi-retirees, in environmental stewardship; incorporate environmental health in older worker programs; train socio-economically disadvantaged elders to conduct outreach and education on environmental issues in their communities.

**(2) Develop and Implement Outreach and Educational Strategies on Risk Reduction of Environmental Health Hazards to Older Adults (Grants)**

Possible areas for activities include but are not limited to: Partnerships with health professionals or health, state, local or tribal agencies to raise awareness of environmental triggers for chronic conditions; public service campaigns to address indoor and outdoor air quality and extreme temperatures; educational workshops

for older adults regarding environmental hazards in the home and the garden; conduct an environmental health needs assessment for older minorities of environmental hazards in the community; develop best practice guides that address toxicants in senior housing and naturally occurring retirement communities (integrated pest management programs); establish environmental guidelines for elder friendly communities; develop a targeted educational campaign to disseminate the annual local water drinking water quality reports to older adults and raise awareness of potential environmental contaminants (see [www.epa.gov/ogwdw/ccr/ccrfact.htm](http://www.epa.gov/ogwdw/ccr/ccrfact.htm)).

**(3) Conduct Outreach and Educational Intergenerational Programs That Engage Older Adults and Children to Address Environmental Health Hazards (Grants)**

Possible outreach and educational areas include but are not limited to raising awareness of the benefits of using non-chemical and alternatives to pesticides in community gardens; raising awareness of recycling programs in the community for items such as batteries, mercury thermometers, cell phones or other electronic equipment.

**(4) Build State Capacity Among State, Local and Tribal Agencies of Aging, Health and the Environment of State and Tribal Agencies to Protect the Health of Older Adults From Environmental Hazards (Grants)**

Possible areas for activities include but are not limited to: Establishing an interagency task force that prioritizes and addresses the leading environmental health problems in their state; convening a state-wide or tribal summit on environmental health hazards, such as environmental triggers for COPD and asthma, to older adults and preparing a plan of action to address these hazards; and developing an annual report on the state of the environmental health of older adults.

**(5) Promote Healthy Communities for Older Adults Through Smart Growth Activities (Cooperative Agreements)**

Foster healthy communities and healthy lifestyles through transportation choice. Possible areas for activities to show the value of decreasing the number of vehicle trips (VTs) and vehicle miles traveled (VTM) include but are not limited to: Decreasing VTs and VTM by increasing awareness of design strategies to maximize pedestrian comfort; design charettes to improve pedestrian and street networks by improving the connectivity of important uses through trails and walking paths;

develop studies that examine policies to encourage older persons reduce single occupancy vehicles and opt for public transportation due to changes made that include trip frequency, or upgrades to buses for accommodating passengers with disabilities.

Encourage compact, mixed use neighborhoods with a range of affordable, environmentally friendly housing choices for older persons. Possible areas for activities to show the value of decreasing VT and VTM include but are not limited to: Workshops to educate older adults about how density creates walkable neighborhoods, support housing choice and affordability, expand transportation choice, and improve neighborhood security; prepare case studies on successful integration of mixed uses into existing communities to meet the needs of older persons for services within walking or biking distance; demonstrate traffic design enhancements that support mobility and safety of older persons (*i.e.*, longer signals, traffic calming measures, reduced street widths, modified medians).

Encourage community and stakeholder collaboration in development decisions. Possible areas for activities include but are not limited to: Develop a program that encourages older adults to engage in community livability assessments to identify and address issues related to creating environmentally preferable communities that improve environmental quality and public health; create and distribute videos to educate all generations about the importance of open space to improve environmental quality and public health; develop educational and outreach programs that showcase effective land use, improved air and water quality through smart growth strategies; initiate outreach programs to inform older persons on how compact, mixed used neighborhoods can grant residents the opportunity to live in neighborhoods that meet their lifestyle preferences and economic means and can reduce VT and VMT while improving regional water quality.

#### *B. Grants*

The demonstration, training or outreach and educational projects will address one of the following principal goals: (1) Train older adults in environmental stewardship; (2) Develop and implement outreach programs and educational strategies for risk reduction of environmental health hazards to older adults; (3) Foster development of civic engagement programs by older

adults to address environmental hazards; and (4) Demonstrate intergenerational projects that address environmental health and ecological well-being.

#### *C. Cooperative Agreements*

(1) Demonstrate how smart growth activities can improve the quality of life for older adults while improving environmental quality.

#### **Section II—Award Information**

Funds available for these projects are expected to total approximately \$200,000. Grants and cooperative agreements are expected to be awarded to approximately eight and 15 entities. Proposals for less than \$15,000 or greater than \$25,000 will not be considered. The awards will vary depending upon solicitation priorities, proposal quality and level of activity, and resource availability. EPA reserves the right to make no awards. It is expected that grants or cooperative agreements will begin in the fall of 2004 and be completed no later than the fall of 2006. If the applicant chooses to submit an application for a cooperative agreement, the agency will have substantial involvement in the project. Cooperative agreements entail substantial federal involvement in the project. The applicant must define the Agency's role in the proposal. Such involvement may include EPA review and approval of project scope and phases; EPA participation in and collaboration on, various phases of the work; EPA review of all draft and final products; regular e-mail, phone, and conference calls.

#### **Section III—Eligibility Information**

##### *A. Eligible Applicants*

Eligible applicants include: State, local, tribal governments, including environmental, health and aging departments, academic institutions and non-profit organizations. Applicants must be eligible under at least one of these authorities: Clean Air Act Section 103 (b)(3); Clean Water Act, Section 104 (b)(3); Federal Insecticide, Fungicide, and Rodenticide Act Section 20; Solid Waste Disposal Act Section 8001; Safe Drinking Water Act, Section 1442; or Toxic Substances Control Act, Section 10. Applicants may only submit one pre-application proposal. Applicants must comply with Executive Order 12372. "Intergovernmental Review of Federal Programs."

##### *B. Cost Sharing or Matching*

Cost sharing or matching funds are not required for this solicitation.

#### *C. Other Eligibility Criteria*

(1) Responsible Officials. Projects must be performed by the applicant or by a person approved by the applicant and EPA. Proposals must identify the person(s) rather than the applicant who will assist in carrying out the project. These individuals are responsible for receiving the grant award agreement from EPA and ensuring that grant conditions are satisfied. Recipients are responsible for the successful completion of the project.

(2) Incurring Costs. Pre-award costs will not be covered by this solicitation. Grant recipients may begin incurring allowable costs on the date identified in the EPA grant award agreement. Activities must be completed and funds spent within the time frames specified in the award agreement. EPA grant funds may be used only for the purposes set forth in the grant agreement and must conform to the Federal cost principles contained in OMB Circular A-87; A-122; and A-21, as appropriate. Ineligible costs will be reduced from the final grant award.

(3) Multiple Proposals: Organizations may submit only one proposal for this solicitation.

(4) Deadlines Pre-applications must be received by June 28, 2004. Late submissions will not be reviewed.

#### **Section IV—Application and Submission Information**

##### *A. Address To Request Application Package*

This solicitation notice contains all of the instructions needed for preparing the pre-application proposal. While there are no required application forms or kits, there are format and content requirements which are described under Section IV (2), "Content and Form Application Submission." Paper copies of this announcement can be obtained by contacting the EPA personnel listed in Section VII. Electronic copies will be available on the Aging Web site. Due to continued mail delays in the Washington, DC area, pre-applications are strongly encouraged to be sent by way of a private shipping company (*e.g.*, Federal Express, UPS, DHL, or courier) to the attention of Kathy Sykes, U.S. EPA, Office of Children's Health Protection, the Aging Initiative, Room 2512 N, 1200 Pennsylvania Avenue, NW., Washington, DC 20004-2403.

##### *B. Content and Form of Application Submission Required*

*Pre-Application: Required Contents:* The pre-application package must include all of the following items: 1. Summary cover page; 2. Federal forms

SF-424 and SF424A (Section B—Budget Categories); 3. Budget narrative; 4. Project narrative; 5. Brief resume or bio of the Principal Investigator or Project Director; and 6. Appendices, as appropriate. The pre-application package is limited to no more than ten pages, excluding the SF-424 and SF424A, and the appendices. Pages must be letter-sized (8½ x 11 inches) and legible. Margins are not specified. Please submit an original and six copies of the pre-application package.

(1) Summary Cover Page (no more than one page).

The summary information page should be one-page long and include the following information:

(a) Making a Difference for the Environment and the Health of Older Adults: Training, Innovation, Outreach and Educational Projects USEPA—AO—OCHP—04—01;

(b) Project title and location;

(c) Applicant's name, address, telephone and fax numbers, and e-mail address;

(d) Name and title of project contact (including how to reach if different from above);

(e) Type of applicant organization (e.g., nonprofit, government agency, etc.) non-profit number.

(f) Total budget request, dollar amount, from U.S. EPA for this project);

(g) Brief abstract of the proposal (5 to 10 lines).

(2) *Completed the SF-424 and the SF 424A* (Section B—Budget Categories) For federal government forms; Budget Forms and Understanding Cost Principles for a Federal grant: See <http://www.epa.gov/aging/grants.html> or [http://www.whitehouse.gov/omb/images/logo\\_omb.gif](http://www.whitehouse.gov/omb/images/logo_omb.gif);

(3) *Budget narrative* (up to 2 pages);

Describe how funds will be used for specific items and activities. Your budget should include some if not all of the following major categories of expenses: personnel (salaries and fringe), travel, equipment, supplies, contract costs, and total direct and indirect costs. EPA will not pay for speaker honorariums.

(4) *Project Narrative* (up to 6 pages).

(i) Description of the lead organization for the project;

(ii) Brief summary statement of the project's concept, goals and objectives;

(iii) Identification of the funding priority addressed by the project (see Section I);

(iv) Brief summary of the method that will be used to achieve the project goals; and

(v) Brief Summary of the kinds of activities that will be funded by the project. Describe precisely what your

project will achieve. In your narrative, be sure to answer these questions in the following order:

(aa) Who will conduct the project? What experience do you and or your partners have in addressing environmental health hazards? What is the nature of your on-going programs addressing environmental health or smart growth issues? If this is a partnership, what will be the roles and responsibilities of each partner? Who will be affected by and/or benefit from the project? How will older adults be targeted, identified, and recruited?

(bb) What is the identified need in the community for this project and how was that need determined?

(cc) What is the purpose of the project? Explain your strategy—your goals and objectives, the specific activities that will be conducted to achieve them, and your projected outcomes. How will you evaluate the results and the level of success? Describe any mechanisms for tracking project outputs (e.g. how many older adults were trained, how many home, or facility assessments were conducted? and evaluating project outcomes (e.g. the effectiveness of the education and mitigation methods, the level of increased awareness, number of persons trained); How will the project be sustained beyond the life of the EPA grant?

(dd) How will project's deliverables and/or findings be disseminated?

(ee) All projects must be completed prior to September 30, 2006. Outline a detailed time line/responsibility matrix to link your project activities to a clear project schedule. Indicate at what point over the months of your budget period each action, project outcome or milestone occurs and indicate who is responsible for each action.

(5) *Brief resume or bio of Principal Investigator or Project Director* (no more than one page).

(6) *Appendices*: As appropriate and relevant, include letters of commitment from all major partners, state environmental, health, and aging departments or other organizations. Remember to include resumes or biographical sketches for key personnel, other than the Principal Investigator as appendices. Be sure letters of commitment focus on the partner's role in the proposed project. Do not include any materials other than letters of commitment and information on key personnel.

### C. Full Proposals If Invited by EPA

#### 1. Contents

The EPA Application Kit for Federal Assistance can be obtained at <http://www.epa.gov/aging/grants.html> or at [http://www.epa.gov/ogd/grants/how\\_to\\_apply.htm](http://www.epa.gov/ogd/grants/how_to_apply.htm).

[www.epa.gov/aging/grants.html](http://www.epa.gov/aging/grants.html) or at [http://www.epa.gov/ogd/grants/how\\_to\\_apply.htm](http://www.epa.gov/ogd/grants/how_to_apply.htm).

#### 2. DUNS Instructions

Grant applicants are required to provide a Dun and Bradstreet (D&B) Data Universal Numbering System (DUNS) number when applying for Federal grants or cooperative agreements. The DUNS number will supplement other identifiers required by statute or regulation, such as tax identification numbers. Organizations can receive a DUNS number in one day, at no cost, by calling the dedicated toll-free DUNS Number request line at 1-866-705-5711. Individuals who would personally receive a grant or cooperative agreement award from the Federal government apart from any business or non-profit organization they may operate are exempt from this requirement. The Web site where an organization can obtain a DUNS number is: <http://www.dnb.com>. This process takes 30 business days and there is no cost unless the organization requests expedited (1-day) processing, which includes a fee of \$40.

#### 3. Dates and Deadlines

(a) All questions must be submitted in writing by no later than June 18, 2004, to the following address:

[aging.info@epa.gov](mailto:aging.info@epa.gov). EPA will post responses to questions at: <http://www.epa.gov/aging/grants.htm>. EPA will not respond to questions by phone or fax.

(b) Deadline for pre-application: Monday, June 28, 2004. U.S. EPA must receive proposals by 5 p.m. eastern standard time (e.s.t.), Monday, June 28, 2004. No late proposals will be accepted. No fax or e-mail submissions will be accepted. Postmarks or meter stamps will not be sufficient documentation of on-time delivery.

(c) Confirmation of receipt of pre-application package will be issued by email not more than seven business days after receipt by the Agency.

(d) EPA will notify applicants eligible to proceed with submitting a full proposal on or before August 16, 2004.

(e) Deadline for submission of full proposals: September 20, 2004.

(f) Applicants will receive an e-mail notification of receipt of the full proposal within 30 days of receipt by the Agency.

(g) Announcement of selected projects: fall 2004.

#### 4. Intergovernmental Review

Applicants may be subject to Executive Order 12372. "Intergovernmental Review of Federal

Programs" See <http://www.whitehouse.gov/omb/grants/spoc.html> for more details.

#### 5. Other Submission Requirements

Please do not submit additional items. Unnecessary materials (cover letters, unrequested forms or binders) create extra burden for the reviewers and failure to follow instructions may lower your score. To ensure fair and open competition, EPA will respond to questions submitted by email through June 21, 2004. Send questions to [aging.info@epa.gov](mailto:aging.info@epa.gov). Questions and responses will be posted no later than two working days at: <http://www.epa.gov/aging/grants.htm>.

### Section V—Application Review Information

#### A. Administrative Review

The pre-application package will undergo an initial administrative review that will cover eligibility, threshold criteria, completeness and timeliness (see deadline above).

#### B. Review and Selection Process for Pre-Application Proposals (Maximum Score: 100 points)

(1) Applications that pass the administrative review will be evaluated by a team of reviewers. Reviewers will score each full proposal based on how well it:

(a) Demonstrates a proven track record and is viewed as an authority in working on the issues dealt with in the pre-application proposal. The project must demonstrate that the recipient has the personnel skills and experience necessary to ensure success. (20 points)

(b) Demonstrates the project (1) Addresses a clear and previously unmet significant community need; (2) identifies who will benefit from the project; (3) involves the community in planning for and execution of the project; (4) provides lasting results. (20 points)

(c) Establishes reasonable/realistic goals and objectives (including reasonable time frames); (1) Clearly outlines a cogent strategy for achieving, tracking, and demonstrating meaningful environmental results; (2) outlines how project's results will be evaluated; and (3) outlines how the project will be sustained beyond the funding cycle. (10 points)

(d) Provides a mechanism for disseminating project results, such as product deliverables and lessons-learned, ability to be replicated in and disseminated to appropriate audiences. (15 points)

(e) Outlines a clear and cost effective budget for proposed project (10 points).

(f) Overall likely success and value of the project (10 points).

(g) Demonstrates effective and substantial involvement of older adults in all aspects of the project. Includes a diverse team of older adults with expertise, experience and skills (15 points).

#### (2) Other Factors:

Selecting officials may also select applications based on geographical location, program balance and diversity. For geographical location selecting officials will consider the location of the projects as they relate to EPA regions. Selecting officials will also look for urban and rural demonstration projects. Based on the funding priorities described in Section I, a variety of priorities will be considered to achieve program balance. Socio-economic need may also be considered a criteria for selection of pre-application proposals.

### Section VI—Award Administration Information

#### A. Award Notices

Successful pre-applicants will be notified on or about August 16, 2004. Unsuccessful applicants will be informed through a letter or fax sent to the Project Director provided by the applicant in the pre-application proposal by August 30, 2004. For successful applicants who are asked to submit a full proposal, you can expect to receive a written notice signed by the EPA grants officer in the fall of 2004. Successful applicants must receive this document before the award can draw funds. This document will serve as the authorizing document. The award notice will be faxed to the key contact that the applicant in the full proposal.

#### B. Administrative Requirements

Reporting requirements include the standard quarterly financial and performance reports, a quality assurance plan if environmental data is collected. The quarterly reports can be submitted by e-mail, followed by a hard copy that is signed and shipped by a private company or through the postal service.

#### C. Reports and Work Products

Financial and other reporting requirements will be identified in the EPA grant award agreement. Grant recipients must submit formal quarterly progress reports, unless otherwise instructed in the award agreement. If environmental information is collected then a quality assurance plan may be required. Two copies of the final report and two copies of all work products must be sent to the EPA project officer within 90 days after the expiration of

the budget period. This submission will be accepted as the final requirement, unless the EPA project officer notifies you that changes must be made.

### Section VII. Agency Contact

Kathy Sykes, Senior Advisor, Aging Initiative, U.S. EPA, Office of Children's Health Protection, 1200 Pennsylvania Ave, NW., Room 2512 Ariel Rios North, Washington, DC 20004-2403, [sykes.kathy@epa.gov](mailto:sykes.kathy@epa.gov), phone: (202) 564-3651, fax: (202) 564-2733, Web site: [www.epa.gov/aging](http://www.epa.gov/aging).

### Section VIII. Other Information

#### A. Resources

First time Federal fund recipients are encouraged to familiarize themselves with the regulations applicable to assistance agreements found in the Code of Federal Regulations (CFR) Title 40, Part 31 for State and local government entities. See <http://www.epa.gov/docs/epacr40/chapt-I.info/subch-B.html>. You may also obtain a copy of the CFR Title 40, Part 31 at your local U.S. Government Bookstore, or through the U.S. Government Printing Office.

#### B. Regulatory References

EPA's general assistance regulations at 40 CFR part 31 apply to state governments.

#### C. Dispute Resolution Process

Procedures are in 40 CFR 30.63 and 40 CFR 31.70.

#### D. Shipping and Mailing Addresses and Information

Applicants who need more information about this grant or clarification about specific requirements of this solicitation notice, should periodically check the web page for posted information <http://www.epa.gov/aging/grants.html>.

Dated: April 12, 2004.

**William H. Sanders III,**

*Acting Director, Office of Children's Health Protection.*

[FR Doc. 04-8678 Filed 4-15-04; 8:45 am]

BILLING CODE 6560-50-U

### ENVIRONMENTAL PROTECTION AGENCY

[OPP-2004-0099; FRL-7353-6]

### FIFRA Scientific Advisory Panel; Notice of Public Meeting

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** There will be a 3-day meeting of the Federal Insecticide, Fungicide,

and Rodenticide Act Scientific Advisory Panel (FIFRA SAP) to consider and review dermal sensitization issues for exposures to pesticides.

**DATES:** The meeting will be held from May 4 to 6, 2004, from 8:30 a.m. to approximately 5 p.m., eastern daylight time.

**Comments.** For the deadlines for the submission of requests to present oral comments and the submission of written comments, see Unit I.E. of the **SUPPLEMENTARY INFORMATION**.

**Special seating.** Requests for special seating arrangements should be made at least 5 business days prior to the meeting.

**ADDRESSES:** The meeting will be held at the Holiday Inn Rosslyn at Key Bridge, 1900 North Fort Myer Drive, Arlington, VA 22209. The telephone number for the Holiday Inn Rosslyn at Key Bridge is (703) 807-2000.

**Comments.** Written comments may be submitted electronically (preferred), through hand delivery/courier, or by mail. Follow the detailed instructions as provided in Unit I. of the

#### **SUPPLEMENTARY INFORMATION.**

*Requests to present oral comments, and special seating.* To submit, requests for special seating arrangements, or requests to present oral comments, notify the DFO listed under **FOR FURTHER INFORMATION CONTACT**. To ensure proper receipt by EPA, your request must identify docket ID number OPP-2004-0099 in the subject line on the first page of your response.

**FOR FURTHER INFORMATION CONTACT:** Paul Lewis, DFO, Office of Science Coordination and Policy (7201M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 564-8450; fax number: (202) 564-8382; e-mail addresses: [lewis.paul@epa.gov](mailto:lewis.paul@epa.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **I. General Information**

###### *A. Does this Action Apply to Me?*

This action is directed to the public in general. This action may, however, be of interest to persons who are or may be required to conduct testing of chemical substances under the Federal Food, Drug, and Cosmetic Act (FFDCA), FIFRA, and the Food Quality Protection Act (FQPA) of 1996. Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the DFO listed under **FOR FURTHER INFORMATION CONTACT**.

###### *B. How Can I Get Copies of this Document and Other Related Information?*

1. **Docket.** EPA has established an official public docket for this action under docket identification (ID) number OPP-2004-0099. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305-5805.

2. **Electronic access.** You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at <http://www.epa.gov/fedrgstr/>.

EPA's position paper, charge/questions to FIFRA SAP, FIFRA SAP composition (i.e., members and consultants for this meeting) and the meeting agenda will be available as soon as possible, but no later than mid April 2004. In addition, the Agency may provide additional background documents as the materials become available. You may obtain electronic copies of these documents, and certain other related documents that might be available electronically, from the FIFRA SAP Internet Home Page at <http://www.epa.gov/scipoly/sap>.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at <http://www.epa.gov/edocket/> to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the appropriate docket ID number.

Certain types of information will not be placed in EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed

in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments in hard copy that are mailed or delivered to the docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

###### *C. How and to Whom Do I Submit Comments?*

You may submit comments electronically (preferred), through hand delivery/courier, or by mail. To ensure proper receipt by EPA, identify the appropriate docket ID number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments. Do not use EPA Dockets or

e-mail to submit CBI or information protected by statute.

1. *Electronically.* If you submit an electronic comment as prescribed in this unit, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. *EPA Dockets.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at <http://www.epa.gov/edocket/>, and follow the online instructions for submitting comments. Once in the system, select "search," and then key in docket ID number OPP-2004-0099. The system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail.* Comments may be sent by e-mail to [opp-docket@epa.gov](mailto:opp-docket@epa.gov), Attention: Docket ID Number OPP-2004-0099. In contrast to EPA's electronic public docket, EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you deliver as described in Unit I.C.2 or mail to the address provided in Unit I.C.3. These electronic submissions will be accepted in WordPerfect or ASCII file

format. Avoid the use of special characters and any form of encryption.

2. *By hand delivery or courier.* Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA Attention: Docket ID Number OPP-2004-0099. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.B.1.

3. *By mail.* Due to potential delays in EPA's receipt and processing of mail, respondents are strongly encouraged to submit comments either electronically or by hand delivery or courier. We cannot guarantee that comments sent via mail will be received prior to the close of the comment period. If mailed, please send your comments to: Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001, Attention: Docket ID Number OPP-2004-0099.

#### *D. What Should I Consider as I Prepare My Comments for EPA?*

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.
2. Describe any assumptions that you used.
3. Provide copies of any technical information and/or data you used that support your views.
4. Provide specific examples to illustrate your concerns.
5. Make sure to submit your comments by the deadline in this document.
6. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

#### *E. How May I Participate in this Meeting?*

You may participate in this meeting by following the instructions in this unit. To ensure proper receipt by EPA, it is imperative that you identify docket ID number OPP-2004-0099 in the subject line on the first page of your request.

1. *Oral comments.* Oral comments presented at the meetings should not be repetitive of previously submitted oral or written comments. Although requests to present oral comments are accepted until the date of the meeting (unless

otherwise stated), to the extent that time permits, interested persons may be permitted by the chair of FIFRA SAP to present oral comments at the meeting. Each individual or group wishing to make brief oral comments to FIFRA SAP is strongly advised to submit their request to the DFO listed under **FOR FURTHER INFORMATION CONTACT** no later than noon, eastern daylight time, April 29, 2004, in order to be included on the meeting agenda. The request should identify the name of the individual making the presentation, the organization (if any) the individual will represent, and any requirements for audiovisual equipment (e.g., overhead projector, 35 mm projector, chalkboard). Oral comments before FIFRA SAP are limited to approximately 5 minutes unless prior arrangements have been made. In addition, each speaker should bring 30 copies of his or her comments and presentation slides for distribution to FIFRA SAP at the meeting.

2. *Written comments.* Although submission of written comments are accepted until the date of the meeting (unless otherwise stated), the Agency encourages that written comments be submitted, using the instructions in Unit I., no later than noon, eastern daylight time, April 29, 2004, to provide FIFRA SAP the time necessary to consider and review the written comments. There is no limit on the extent of written comments for consideration by FIFRA SAP. Persons wishing to submit written comments at the meeting should contact the DFO listed under **FOR FURTHER INFORMATION CONTACT** and submit 30 copies.

3. *Seating at the meeting.* Seating at the meeting will be on a first-come basis. Individuals requiring special accommodations at this meeting, including wheelchair access, should contact the DFO at least 5 business days prior to the meeting using the information under **FOR FURTHER INFORMATION CONTACT** so that appropriate arrangements can be made.

## **II. Background**

### *A. Purpose of the FIFRA SAP*

Amendments to FIFRA enacted November 28, 1975 (7 U.S.C. 136w(d)), include a requirement under section 25(d) of FIFRA that notices of intent to cancel or reclassify pesticide regulations pursuant to section 6(b)(2) of FIFRA, as well as proposed and final forms of rulemaking pursuant to section 25(a) of FIFRA, be submitted to a SAP prior to being made public or issued to a registrant. In accordance with section 25(d) of FIFRA, the FIFRA SAP is to have an opportunity to comment on the

health and environmental impact of such actions. The FIFRA SAP also shall make comments, evaluations, and recommendations for operating guidelines to improve the effectiveness and quality of analyses made by Agency scientists. Members are scientists who have sufficient professional qualifications, including training and experience, to be capable of providing expert comments as to the impact on health and the environment of regulatory actions under sections 6(b) and 25(a) of FIFRA.

The Deputy Administrator appoints seven individuals to serve on the FIFRA SAP for staggered terms of 4 years, based on recommendations from the National Institutes of Health and the National Science Foundation.

Section 104 of FQPA (Public Law 104-170) established the FQPA Science Review Board (SRB). These scientists shall be available to the FIFRA SAP on an ad hoc basis to assist in reviews conducted by the FIFRA SAP.

#### *B. Public Meeting*

EPA is seeking expert advice on how to evaluate general population exposures to pesticides that are recognized to cause dermal sensitization. Specifically, the Agency is interested in better understanding how such exposures may induce sensitization in the general population and how to establish criteria to protect against unacceptable dermal reaction. The Agency is also seeking guidance from the SAP on how such exposures impact individuals already sensitized.

The Agency is seeking this guidance in the context of addressing exposures to potential dermal sensitizers incorporated into treated articles (e.g., textiles and wood). Hexavalent chromium, as a component of a pesticide product intended to be used as a wood preservative, will be presented to the SAP as a case study to explore methodologies to assess these types of exposure scenarios. The methods developed for hexavalent chromium could form the basis for determining the approach/types of data needed to assess dermal sensitizers potentially used in products available to consumers. The SAP will meet to consider, review and to provide expertise in advising the Agency on these general issues.

Historically, EPA has qualitatively assessed pesticide chemicals with the potential for causing allergic contact dermatitis (ACD) for occupational and other settings (i.e., to workers mixing, loading, and/or applying the pesticide or exposed to the pesticide immediately following treatment as well as residential exposures). While EPA

believes that the greatest exposures would generally occur to individuals in occupational settings, the Agency recognizes that following use of these chemicals in treated articles, the general population also may be potentially at risk of ACD from dermal contact with these chemicals. EPA has not previously used an assessment of dermal sensitization risk for pesticides. In cases where dermal sensitization issues arise from occupational exposure use patterns, the Agency currently employs labeling to warn of potential sensitization effects and/or requires use of personal protective equipment to address the potential concerns for dermal sensitization. Due to the unique exposures to the general public associated with treated articles, for example a treated deck, it is not feasible to employ these labeling approaches in order to avoid exposures for critical periods. Thus, there is interest in developing quantitative approaches to assessing the potential for dermal sensitization from exposure to pesticides.

EPA seeks the Panel's advice on several specific issues before determining an appropriate scientific approach to evaluate potential dermal sensitization risks for pesticide treated articles. The Agency is interested in learning of any specific types of data that would be adequate to determine the magnitude, duration, and frequency of exposure needed to cause induction of ACD in the unsensitized population and to elicit ACD in the sensitized population. To assist the Agency in its deliberations, the SAP will be asked to provide guidance on any special scientific considerations, including the relative susceptibility of adults and children to induction of ACD as well as the elicitation of ACD. For example, would children exposed to hexavalent chromium while playing on a deck with treated wood have a greater susceptibility to induction of dermal sensitization than adults? What uncertainty factors should be considered in the regulatory process to protect for this specific exposure scenario? EPA is also interested in determining under what circumstances it would be appropriate to use a quantitative approach to assess the potential for induction of ACD for non-occupational exposures.

#### *C. FIFRA SAP Meeting Minutes*

The FIFRA SAP will prepare meeting minutes summarizing its recommendations to the Agency in approximately 60 days after the meeting. The meeting minutes will be posted on the FIFRA SAP web site or

may be obtained by contacting the PIRIB at the address or telephone number listed in Unit I.

#### **List of Subjects**

Environmental protection, Pesticides and pests.

Dated: April 8, 2004.

**Joseph J. Merenda, Jr.,**

*Director, Office of Science Coordination and Policy.*

[FR Doc. 04-8768 Filed 4-14-04; 3:00 pm]

**BILLING CODE 6560-50-S**

## **ENVIRONMENTAL PROTECTION AGENCY**

[Docket No. RCRA-2003-0014; FRL-7648-6]

### **Announcement of a Public Stakeholder Meeting Concerning the Hazardous Waste Generator Regulatory Program**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of a public stakeholder meeting.

**SUMMARY:** EPA's Office of Solid Waste is holding a series of public meetings in May 2004 to obtain input from its many stakeholders on the effectiveness of the Resource Conservation and Recovery Act's (RCRA's) hazardous waste generator regulatory program. Concurrent with this effort, the Agency intends to issue an Advanced Notice of Proposed Rulemaking (ANPRM) seeking comment on a series of questions related to the RCRA hazardous waste generator regulatory program. With the information collected from these two efforts, we will evaluate and determine whether changes to the hazardous waste generator program are appropriate and, if so, develop and implement a program strategy with the goals of fostering: improved program effectiveness; a pollution prevention stewardship philosophy; and decrease compliance cost where practicable.

The following topics are planned for discussion:

1. What areas of the generator program are working well?
2. How can we improve the program through the use of innovative solutions and improved technical assistance?
3. How can we improve the program through better performance measurements, burden reductions and pollution prevention/recycling?

Additional detail can be found under Tentative Agenda. A tentative agenda is on the Web at: <http://www.epa.gov/epaoswer/hazwaste/gener/init/index.htm>.

Interested parties may choose to attend the meeting, submit written comment, or both. Oral comments will be limited to two minutes each.

**DATES:** The stakeholder meetings are scheduled for 9 a.m.–5 p.m. local time:

May 4, 2004, Boston, MA; May 13, 2004, Washington, DC; May 17, 2004, Chicago, IL; May 24, 2004, Seattle, WA. Submit written comments on or before June 30, 2004.

**ADDRESSES:** Boston, MA, Tip O'Neil Federal Building, 10 Causeway Street, Boston, MA 02222, May 4, 2004;

Washington DC, U.S. Environmental Protection Agency—East Building, Room 1153, 1201 Constitution Avenue, NW., May 13, 2004;

Chicago, IL, Metcalfe Federal Building, Morrison Conference Room 331, 77 W. Jackson, May 17, 2004;

Seattle, WA, Radisson Hotel Seattle Airport, 17001 Pacific Highway South, May 24, 2004.

Written comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in section I.C. of the **SUPPLEMENTARY INFORMATION** section.

**FOR FURTHER INFORMATION CONTACT:**

Further information may be found at: <http://www.epa.gov/epaoswer/hazwaste/gener/init/index.htm>. If you do not have access to the Web, contact the RCRA Call Center at 800 424–9346 or TDD 800 553–7672 (hearing impaired). In the Washington, DC, metropolitan area, call 703 412–9810 or TDD 703 412–3323. You may also contact Jim O'Leary, Office of Solid Waste (5304W), Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: (703) 308–8827; fax number: (703) 308–0514.

**SUPPLEMENTARY INFORMATION:**

**I. General Information**

*A. Does This Meeting Apply to Me?*

While the meeting is open to the public in general, the identified topics may be of particular interest to persons who are hazardous waste generators or associations that represent hazardous waste generators or persons who are concerned about the implementation of the Resource Conservation and

Recovery Act's (RCRA) hazardous waste generator program. Potentially interested parties may include but are not limited to: hazardous waste generators, trade associations representing hazardous waste generators, federal or state officials involved with implementing the hazardous waste generator regulatory

program, concerned citizens, and environmental organizations. If you have any questions regarding the applicability of this meeting to a particular entity, consult the information listed under **FOR FURTHER INFORMATION CONTACT**.

*B. How Can I Get Electronic Access to This Document and Other Related Information?*

1. Docket. EPA has established an official public docket for this action under Docket ID No. RCRA–2003–0014. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Documents in the official public docket are listed in the index list in EPA's electronic public docket and comment system, EDOCKET. Documents may be available either electronically or in hard copy. Electronic documents may be viewed through EDOCKET. Hard copy documents may be viewed at the EPA Docket Center, (EPA/DC) EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1742, and the telephone number for the EPA Docket Center is (202) 566–0270.

2. Electronic Access. You may access this **Federal Register** document electronically through the EPA Internet under the "Federal Register" listings at <http://www.epa.gov/fedrgstr/>. You may also go to the federal-wide eRulemaking site at <http://www.regulations.gov>.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EDOCKET. You may use EDOCKET at <http://www.epa.gov/edocket/> to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the appropriate docket identification number. Certain types of information will not be placed in EDOCKET.

Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's

policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EDOCKET, the system will identify whether the document is available for viewing in EPA's electronic public docket. Publicly available docket materials that are not available electronically may be viewed at the docket facility identified in section I.B.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the Docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

*C. How and to Whom Do I Submit Comments?*

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments. However, late comments may be considered if time permits.

1. Electronically. If you submit an electronic comment as prescribed below, EPA recommends that you include your name, mailing address,

and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. EPA Dockets. Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EDOCKET at <http://www.epa.gov/edocket>, and follow the online instructions for submitting comments. To access EPA's electronic public docket from the EPA Internet Home Page, select "Information Sources," "Dockets," and "EDOCKET." Once in the system, select "search," and then key in Docket ID No. RCRA-2003-0014. The system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. E-mail. Comments may be sent by electronic mail (e-mail) to [rcra-docket@epa.gov](mailto:rcra-docket@epa.gov), Attention Docket ID No. RCRA 2003-0014. In contrast to EPA's electronic public docket, EPA's email system is not an "anonymous access" system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. Disk or CD ROM. You may submit comments on a disk or CD ROM that you mail to the mailing address identified in section 1.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. Mail. Send your comments to: OSWER Docket, EPA Docket Center,

Environmental Protection Agency, Mail Code: 5305T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID No. RCRA-2003-0014.

3. By Hand Delivery or Courier. Deliver your comments to: OSWER Docket, EPA Docket Center, 1301 Constitution Avenue, NW., EPA West Building, Room B-102, Washington, DC 20004, Attention Docket ID No. RCRA-2003-0014. Such deliveries are only accepted during the Docket's normal hours of operation as identified in section I.B.1.

## II. Background

In 1980, the Agency promulgated regulations applicable to generators of hazardous waste. EPA amended the regulations in 1986 to address small quantity generators and again in the late 1980's and early 1990's to address land disposal restrictions and air emission control requirements for generators, respectively. These regulations are found at 40 CFR 261.5 and 40 CFR part 262. The regulations establish procedures and requirements for the management of hazardous waste on-site and off-site for both large and small quantity generators (LQGs and SQGs), as well as conditionally exempt small quantity generators (CESQGs).

The implementation of the generator regulations has played a major role in ensuring that hazardous waste has been properly managed. However, during the twenty years since their promulgation, generators and s have developed a great deal of experience with this program. These experiences have been both positive and challenging. On the positive side, thousands of generators instituted programs that successfully prevent spills and accidents and ensure the safe management of hazardous waste. EPA and the s developed effective training, compliance and technical assistance programs that support hazardous waste generators.

These successes, however, have not come without challenges. Stakeholders tell us that they find the RCRA hazardous waste generator regulatory program to be very complex. Some generators believe the regulations are confusing. This may be particularly true for small businesses who often do not have the in-house capabilities or resources to devote to understanding and complying with the hazardous waste regulations. In other cases, EPA has heard that some hazardous waste generator regulations duplicate other federal regulations. Some stakeholders, conversely, are concerned that gaps may exist in the current regulations that could impede the safe management of hazardous waste.

With these challenges as background, the objective of the public meetings is collect pertinent information from key stakeholders that will allow EPA to evaluate the effectiveness of the hazardous waste generator regulatory program and to determine if changes to the program are necessary. If so, EPA will develop and implement a hazardous waste generator program strategy with the goals of fostering improved program effectiveness, fostering a pollution prevention stewardship philosophy, and reducing compliance cost, where practicable.

(Note: This effort focuses only on the generator regulations in 40 CFR 261.5 and 40 CFR part 262, and the management requirements in 40 CFR part 265 referenced in the generator regulations. We are not addressing issues associated with the definition of solid waste, hazardous waste identification regulations associated with listings and characteristics, or export provisions.)

## III. Tentative Agenda

Copies of the tentative agenda for this meeting are available on the Web at: <http://www.epa.gov/epaoswer/hazwaste/gener/init/index.htm>, via mail, fax, or email. If you would like a copy, please go to the website or use the contact information listed under **FOR FURTHER INFORMATION CONTACT**.

## IV. How Can I Participate in This Meeting?

You may attend this meeting in person or submit a written comment. Attendance will be limited by the capacity of the meeting rooms as follows: Boston, MA—250 people; Washington, DC—136 people; Chicago, IL—300 people; and Seattle, WA—250 people. Members of the public wishing to have access to the meeting rooms on the day of the meeting should register no later than one week before the date of the meeting you wish to attend. You may register on the Web at <http://www.epa.gov/epaoswer/hazwaste/gener/init/index.htm>. If you do not have access to the web you may contact the RCRA Call Center at 800 424-9346 or TDD 800 553-7672 (hearing impaired). In the Washington, DC, metropolitan area, call 703 412-9810 or TDD 703 412-3323. For meetings held in federal or public facilities, visitors will be asked to show photo identification, will be screened through security equipment, and will be escorted to the meeting room from the security check-in. Please leave sufficient time to check with security when you arrive at the meeting location.

Any person needing special accessibility accommodations for this

meeting should so indicate on the registration form on the web or contact the Call Center identified above at least five business days prior to the meeting you wish to attend so we can make the appropriate arrangements. Any person who wishes to file a written statement may do so by June 30, 2004. EPA has established an official public docket for this action under Docket ID No. RCRA-2003-0014. Please see section I.C. for instructions on how to submit written comments.

#### V. On What Topics and Questions Will EPA Be Soliciting Input?

1. What areas of the generator program are working well?

A. Is the existing hazardous waste generator program meeting its goals of protecting human health and the environment?

B. What parts of the program work effectively and why?

2. How can we improve the program through the use of innovative solutions and improved technical assistance?

A. What parts of the program can be improved? What are some workable solutions? What benefits would be derived from these potential solutions?

B. Are there any new management techniques; e.g., environmental management systems, or technologies; e.g., better use of information management systems, that lend themselves to improving the existing regulatory framework? What would be the benefits to the program if adopted?

C. What, if any, state hazardous waste regulations, interpretations or implementation programs should EPA review and evaluate in order to improve or clarify the federal regulations?

D. How can EPA and the states improve their compliance and technical assistance activities to hazardous waste generators?

3. How can we improve the program through better performance measurements, burden reductions and pollution prevention/recycling?

A. What measures should the program use to most effectively capture the environmental benefits of the hazardous waste generator regulatory program?

B. Are there areas where we can achieve further reporting/paperwork burden reduction while allowing EPA to measure environmental results?

C. How can EPA encourage generators to practice pollution prevention and recycling?

A tentative agenda is available. If you would like a copy, please go to the Web site or use the contact information listed under **FOR FURTHER INFORMATION CONTACT**. Be advised that there may be slight changes to the agenda either in

content or duration, so please check the Web site before attending the meeting for the latest information.

**James R. Berlow.**

*Acting Office Director, Office of Solid Waste.*

[FR Doc. 04-8675 Filed 4-15-04; 8:45 am]

**BILLING CODE 6560-50-P**

#### ENVIRONMENTAL PROTECTION AGENCY

[FRL-7649-2]

#### Science Advisory Board Staff Office; Notification of an Upcoming Science Advisory Board Meeting

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** The EPA Science Advisory Board (SAB) Staff Office announces a public face-to-face meeting of the Executive Board of the EPA SAB. The Board will discuss several issues and review two SAB Committee reports.

**DATES:** June 3-4, 2004. A public meeting of the Board will be held from 9 a.m. to 5:30 p.m. (eastern time) on June 3, 2004, and from 8:30 a.m. to 3 p.m. (eastern time) on June 4, 2004.

**ADDRESSES:** The June 3-4, 2004 meeting of the Board will be held in the EPA Science Advisory Board Conference Center (Room 3705), 1025 F Street, NW., Washington, DC 20004.

**FOR FURTHER INFORMATION CONTACT:** Members of the public who wish to obtain further information regarding the SAB may contact Mr. Thomas O. Miller, Designated Federal Officer (DFO), SAB Staff Office, via phone (202-343-9982) or e-mail at [miller.tom@epa.gov](mailto:miller.tom@epa.gov), or Dr. Anthony Maciorowski, Associate Director for Science, SAB Staff Office, via phone (202-343-9983) or e-mail at [maciorowski.anthony@epa.gov](mailto:maciorowski.anthony@epa.gov).

The SAB Mailing address is: U.S. EPA, Science Advisory Board Staff Office (1400F), 1200 Pennsylvania Avenue, NW., Washington, DC 20460. General information about the SAB, as well as any updates concerning the meetings announced in this notice, may be found in the SAB Web site at <http://www.epa.gov/sab>.

#### SUPPLEMENTARY INFORMATION:

Background on the Board Meeting: At this meeting, the Science Advisory Board will focus on the following: (a) A discussion of the procedures and outcomes of the Board's recent review of the Fiscal Year (FY) 2005 science and research budgets for EPA, (b) a discussion of the nominated advisory projects for FY 2005, (c) initiate

planning for the SAB Annual meeting (scheduled for December 2004), and (d) review a number of SAB Committees' draft reports. Any additional items that are identified prior to the meeting will be reflected on the meeting agenda that will be posted on the SAB Web site prior to the meeting.

(a) Science and Research Budget Review: The SAB recently reviewed the EPA Science and Research budget proposal for FY 2005. Information on that review, and the report to the EPA Administrator that was developed as a result of that activity, are available on the SAB Web site at: [http://www.epa.gov/sab/panels/fy2005\\_sci\\_res\\_budget\\_advisory.html](http://www.epa.gov/sab/panels/fy2005_sci_res_budget_advisory.html). At this meeting, the Board will discuss the process and results of the FY 2005 science and research budget review with Agency officials. The purpose will be to consider process changes for the FY 2006 budget review cycle that will make the SAB-EPA interaction more efficient and improve its focus. The Board intends to hold a series of briefings at each of its meetings throughout the year to allow it to learn more on specific EPA Science and Research programs.

(b) Review of Nominated Advisory Projects for FY 2005: The Board will conduct an initial review of nominated projects from the Agency and the SAB.

(c) Review of SAB Committee Reports: The Board will review two draft SAB reports. These include reports on: (1) The SAB's review of EPA's Environmental Economics Research Strategy, and (2) the SAB's review of EPA's Air Toxics Research Strategy. Information on these reviews, and drafts of each report, can be found on the SAB Web site at: <http://www.epa.gov/sab/drrep.htm>.

*Availability of Review Material for the Board Meeting:* Documents that are the subject of this meeting are available from the SAB Web site at: <http://www.epa.gov/sab>.

*Procedures for Providing Public Comment:* It is the policy of the EPA SAB Staff Office to accept written public comments of any length, and to accommodate oral public comments whenever possible. The SAB Staff Office expects that public statements presented at Board meetings will not be repetitive of previously submitted oral or written statements. *Oral Comments:* In general, each individual or group requesting an oral presentation at a face-to-face meeting will be limited to a total time of ten minutes (unless otherwise indicated). Interested parties should contact the DFO in writing via e-mail at least one week prior to the meeting in order to be placed on the public speaker list for the meeting. Speakers should

bring at least 35 copies of their comments and presentation slides for distribution to the participants and public at the meeting. *Written Comments:* Although written comments are accepted until the date of the meeting (unless otherwise stated), written comments should be received in the SAB Staff Office at least one week prior to the meeting date so that the comments may be made available to the committee for their consideration. Comments should be supplied to the DFO at the address/contact information above in the following formats: one hard copy with original signature, and one electronic copy via e-mail (acceptable file format: Adobe Acrobat, WordPerfect, Word, or Rich Text files (in IBM-PC/Windows 95/98 format). Those providing written comments and who attend the meeting are also asked to bring 35 copies of their comments for public distribution.

*Meeting Accommodations:* Individuals requiring special accommodation to access these meetings, should contact the DFO at least five business days prior to the meeting so that appropriate arrangements can be made.

Dated: April 8, 2004.

**Vanessa T. Vu,**

*Director, EPA Science Advisory Board Staff Office.*

[FR Doc. 04-8672 Filed 4-15-04; 8:45 am]

BILLING CODE 6560-50-P

## ENVIRONMENTAL PROTECTION AGENCY

[FRL-7649-3]

### Science Advisory Board Staff Office; Notification of an Upcoming Meeting of the Science Advisory Board Review Panel for the EPA's Report on the Environment

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** The EPA Science Advisory Board (SAB) Staff Office announces a public teleconference of the SAB Review Panel for the Agency's Report on the Environment (ROE).

**DATES:** May 3, 2004. The public teleconference will be held on May 3, 2004, from 11 a.m. to 1 p.m. (eastern time).

**FOR FURTHER INFORMATION CONTACT:** Any member of the public wishing to obtain the teleconference call-in number and access code to participate in the teleconference may contact Dr. Thomas Armitage, Designated Federal Officer

(DFO), U.S. EPA Science Advisory Board by telephone/voice mail at (202)-343-9995, or via e-mail at [armitage.thomas@epa.gov](mailto:armitage.thomas@epa.gov).

The SAB Mailing address is: U.S. EPA, Science Advisory Board (1400F), 1200 Pennsylvania Avenue, NW., Washington, DC 20460. General information about the SAB may be found in the SAB Web site at <http://www.epa.gov/sab>.

#### SUPPLEMENTARY INFORMATION:

*Background:* Pursuant to the Federal Advisory Committee Act, Pub. L. 92-463, notice is hereby given that the Panel will hold a public teleconference to provide advice to the EPA on the Agency's Report on the Environment. The Panel reviewed the ROE at a public meeting held on March 9-12, 2004, and developed a draft advisory report to EPA. Background information on the Panel and its review of the ROE was provided in **Federal Register** notices published on June 17, 2003 (68 FR 35883-35884), and February 4, 2004 (69 FR 5339-5340). The purpose of the Panel's teleconference is to discuss the draft advisory report and identify any clarifications needed for the final draft advisory report to the SAB for review and approval. The teleconference agenda and the draft advisory report will be posted on the SAB Web site prior to the teleconference. EPA's draft Report on the Environment may be found at: <http://www.epa.gov/indicators/roe/html/roePDF.htm>.

*Procedures for Providing Public Comment:* It is the policy of the EPA Science Advisory Board (SAB) Staff Office to accept written public comments of any length, and to accommodate oral public comments whenever possible. The EPA SAB Staff Office expects that public statements presented at the ROE teleconference will not be repetitive of previously submitted oral or written statements. *Oral Comments:* In general, each individual or group requesting an oral presentation at a conference call meeting will be limited to no more than three minutes per speaker and no more than fifteen minutes total. Interested parties should contact the DFO in writing via e-mail at least one week prior to the teleconference in order to be placed on the public speaker list. *Written Comments:* Although written comments are accepted until the date of the teleconference (unless otherwise stated), written comments should be received in the SAB Staff Office at least one week prior to the teleconference date so that the comments may be made available to the committee or panel for their consideration. Comments should

be supplied to the DFO at the address/contact information above in the following formats: one hard copy with original signature, and one electronic copy via e-mail (acceptable file format: Adobe Acrobat, WordPerfect, Word, or Rich Text files (in IBM-PC/Windows 95/98 format)).

#### Meeting Accommodations:

Individuals requiring special accommodation to access the teleconference, should contact the relevant DFO at least five business days prior to the meeting so that appropriate arrangements can be made.

Dated: April 8, 2004.

**Vanessa T. Vu,**

*Director, EPA Science Advisory Board Staff Office.*

[FR Doc. 04-8673 Filed 4-15-04; 8:45 am]

BILLING CODE 6560-50-P

## ENVIRONMENTAL PROTECTION AGENCY

[FRL-7649-1]

### E-Docket Number: ORD-2003-0012; Draft Toxicological Review of Phosgene; In Support of Summary Information on the Integrated Risk Information System

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice of public comment period.

**SUMMARY:** The U.S. Environmental Protection Agency (EPA) is announcing that a 45-day public comment period for the draft document titled, Toxicological Review of Phosgene In Support of Summary Information on the Integrated Risk Information System (IRIS) (NCEA-S-1207). The document was prepared by the EPA's National Center for Environmental Assessment-Washington Office (NCEA-W) within the Office of Research and Development. NCEA will consider the peer-review advice and public comment submissions in revising the document.

**DATES:** The 45-day public comment period begins April 16, 2004, and ends June 1, 2004. Technical comments must be postmarked by June 1, 2004.

**ADDRESSES:** The draft Toxicological Review of Phosgene is available primarily via the Internet on the National Center for Environmental Assessment's home page at <http://www.epa.gov/ncea> under the What's New and Publications menus. A limited number of paper copies are available from the Technical Information Staff, NCEA-W; telephone: 202-564-3261; facsimile: 202-565-0050. If you are

requesting a paper copy, please provide your name, mailing address, and the document title and number, Toxicological Review of Phosgene (NCEA-S-1207).

Comments may be submitted electronically, by mail, by facsimile, or by hand delivery/courier. Please follow the detailed instructions as provided in the **SUPPLEMENTARY INFORMATION** section.

**FOR FURTHER INFORMATION CONTACT:** For information on the document, contact Dharm Sing; telephone: 202-564-3313; facsimile: 202-564-0078; or e-mail: [Singh.Dharm@epa.gov](mailto:Singh.Dharm@epa.gov).

**SUPPLEMENTARY INFORMATION:**

EPA has established an official public docket for this action under Docket ID No. ORD-2003-0012. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Office of Environmental Information (OEI) Docket in the Headquarters EPA Docket Center, (EPA/DC) EPA West Building, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is 202-566-1744, and the telephone number for the OEI Docket is 202-566-1752; facsimile: 202-566-1753; or e-mail: [ORD.Docket@epa.gov](mailto:ORD.Docket@epa.gov).

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at <http://www.epa.gov/edocket/> to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the appropriate docket identification number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in

printed, paper form in the official public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the Docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

You may submit comments electronically, by mail, by facsimile, or by hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." Late comments may be considered if time permits.

If you submit an electronic comment as prescribed below, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic

public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at <http://www.epa.gov/edocket>, and follow the online instructions for submitting comments. To access EPA's electronic public docket from the EPA Internet Home Page, select "Information Sources," "Dockets," and "EPA Dockets." Once in the system, select "search," and then key in Docket ID No. ORD-2003-0012. The system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

Comments may be sent by electronic mail (e-mail) to [ORD.Docket@epa.gov](mailto:ORD.Docket@epa.gov), Attention Docket ID No. ORD-2003-0012. In contrast to EPA's electronic public docket, EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly to the Docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

You may submit comments on a disk or CD ROM. These electronic submissions will be accepted in WordPerfect, Word, or ASCII file format. Avoid the use of special characters and any form of encryption.

If you provide comments in writing, please submit one unbound original with pages numbered consecutively, and three copies of the comments. For attachments, provide an index, number pages consecutively with the comments, and submit an unbound original and three copies.

Dated: March 30, 2004.

**Peter W. Preuss,**

*Director, National Center for Environmental Assessment.*

[FR Doc. 04-8674 Filed 4-15-04; 8:45 am]

**BILLING CODE 6560-50-P**

**FEDERAL DEPOSIT INSURANCE CORPORATION****Agency Information Collection Activities: Renewal of an Information Collection; Comment Request**

**AGENCY:** Federal Deposit Insurance Corporation (FDIC).

**ACTION:** Notice and request for comment.

**SUMMARY:** The FDIC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on the proposed renewal of an information collection, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35). Currently, the FDIC is soliciting comments concerning an information collection titled "Transfer Agent Registration and Amendment Form."

**DATES:** Comments must be submitted on or before June 15, 2004.

**ADDRESSES:** Interested parties are invited to submit written comments to Thomas Nixon, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429. All comments should refer to "Transfer Agent Registration and Amendment Form." Comments may be hand-delivered to the guard station at the rear of the 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m. Comments may also be submitted to the OMB desk officer for the FDIC: Mark Menchik, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** Thomas Nixon, (202) 898-8766, or at the address above.

**SUPPLEMENTARY INFORMATION:**

*Proposal to renew the following currently approved collection of information:*

*Title:* Transfer Agent Registration and Amendment Form.

*OMB Number:* 3064-0026.

*Frequency of Response:* On occasion.

*Affected Public:* State chartered banks that are not members of the Federal Reserve system and their direct subsidiaries.

*Estimated Number of Respondents:* 6 initial registrations; 12 amendments.

*Estimated Time per Response:* 1.25 hours per initial registration; .75 hours per amendment.

*Estimated Total Annual Burden:* 16.5 hours.

*General Description of Collection:* Under section 17A(c)(1) of the Securities Exchange Act of 1934, it is

unlawful for any transfer agent to perform any transfer agent function with respect to any qualifying security unless that transfer agent is registered with its appropriate regulatory agency. Pursuant to section 17A(c)(2), before an insured nonmember bank and its direct subsidiaries may perform any transfer agent function for a qualifying security, it must register on Form TA-1 with the FDIC and its registration must become effective.

**Request for Comment**

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the information collection, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

At the end of the comment period, the comments and recommendations received will be analyzed to determine the extent to which the collection should be modified prior to submission to OMB for review and approval. Comments submitted in response to this notice also will be summarized or included in the FDIC's requests to OMB for renewal of this collection. All comments will become a matter of public record.

Dated in Washington, DC, this 13th day of April, 2004.

Federal Deposit Insurance Corporation.

**Robert E. Feldman,**

*Executive Secretary.*

[FR Doc. 04-8680 Filed 4-15-04; 8:45 am]

**BILLING CODE 6714-01-P**

**FEDERAL RESERVE SYSTEM****Formations of, Acquisitions by, and Mergers of Bank Holding Companies**

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies

owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at [www.ffiec.gov/nic/](http://www.ffiec.gov/nic/).

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than May 10, 2004.

**A. Federal Reserve Bank of St. Louis** (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63166-2034:

1. *Mountain Home Bancshares, Inc.*, Mountain Home, Arkansas; to acquire 100 percent of the voting shares of Pocahontas Bankstock, Inc., Pocahontas, Arkansas, and thereby indirectly acquire voting shares of Bank of Pocahontas, Pocahontas, Arkansas.

Board of Governors of the Federal Reserve System, April 12, 2004.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. 04-8604 Filed 4-15-04; 8:45 am]

**BILLING CODE 6210-01-S**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES****Office of the Secretary**

[Document Identifier: OS-0990-New]

**Agency Information Collection Activities: Proposed Collection; Comment Request**

**AGENCY:** Office of the Secretary, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden

estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

*Type of Information Collection Request:* New collection; *Title of Information Collection:* Assessment Study of the Uses of HealthierUS and Healthy People 2010; *Form/OMB No.:* OS-0990-New;

*Use:* The goal of this assessment is to create a comprehensive picture of how and by whom, the Federal health promotion and disease prevention initiatives, HealthierUS and Healthy People 2010 contribute to State or local disease prevention and health promotion planning. *Frequency:* Recordkeeping; *Affected Public:* State, local, or tribal governments; *Annual Number of Respondents:* 300; *Total Annual Responses:* 300; *Average Burden per Response:* 15 minutes; *Total Annual Hours:* 2,280.75.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access the HHS Web site address at <http://www.hhs.gov/oirm/infocollect/pending/> or e-mail your request, including your address, phone number, OMB number, and OS document identifier, to [naomi.cook@hhs.gov](mailto:naomi.cook@hhs.gov), or call the Reports Clearance Office on (202) 690-6162. Written comments and recommendations for the proposed information collections must be mailed within 30 days of this notice directly to the OMB Desk Officer at the address below:

OMB Desk Officer: Brenda Aguilar, OMB Human Resources and Housing Branch, Attention: (OMB #0990-NEW), New Executive Office Building, Room 10235, Washington, DC 20201.

Dated: April 9, 2004.

**Robert E. Polson,**

*Office of the Secretary, Paperwork Reduction Act Reports Clearance Officer.*

[FR Doc. 04-8624 Filed 4-15-04; 8:45 am]

BILLING CODE 4168-17-P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

#### Centers for Genomics and Public Health

*Announcement Type:* New.

*Funding Opportunity Number:* 04143.

*Catalog of Federal Domestic*

*Assistance Number:* 93.061.

*Key Dates:*

*Letter of Intent Deadline:* May 17, 2004.

*Application Deadline:* June 15, 2004.

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#### I. Funding Opportunity Description

##### I.1 Authority

This program is authorized under section 317(k)(2) of the Public Health Service Act (42 U.S.C. 247b(k)(2)), as amended.

##### I.2 Background

The wealth of information generated by the recently completed Human Genome Project has captivated both the scientific community and the public, and created an expectation that this knowledge will yield future health benefits. As a result, there is an emerging need to discover what human genome variation means for health and disease in populations. How can research results be translated into opportunities to improve the public's health? How can genomic information

be used to prevent, detect and treat disease? How will the health workforce acquire the knowledge and skills needed to support the integration of genomics into health practice and programs?

In response to these needs, the Office of Genomics and Disease Prevention (OGDP) in collaboration with the Association of Schools of Public Health has funded cooperative agreements with three Schools of Public Health to establish the first Centers for Genomics and Public Health in 2001 ([www.cdc.gov/genomics/activities/fund2001.htm](http://www.cdc.gov/genomics/activities/fund2001.htm)). The goal for the initial three-year project period was to establish regional hubs of expertise in genomics and population health by coordinating existing institutional programs at the schools of public health and then reaching out to engage public health programs, health care providers and community groups. These partnerships provide a foundation for a national network of resource centers that could develop the capacity required to respond to future needs and opportunities related to genomics. In the original cooperative agreement, activities were focused in three areas: (1) Increasing the knowledge base in genomics and public health; (2) providing technical assistance to community, state, and regional organizations related to the integration of genomics into public health policy and programs; and (3) developing and providing training for the existing and future health workforce, with a particular focus on enhancing knowledge and awareness of genomics applications among public health workers.

##### I.3 Purpose

Since the initial funding of the Centers, the potential impact of genomics on health practice and the health workforce has been widely acknowledged. The 2002 Institute of Medicine (IOM) report entitled "Who Will Keep the Public Healthy?" ranked genomics as one of eight content areas to be included in public health education programs (<http://www.iom.edu/file.asp?id=4166>). Likewise, the CDC has identified genomics as an agency priority, citing the need to assess the impact of genomic variation on population health and to incorporate genomics into public health programs and practice (Comments of Dr. Julie Gerberding, CDC Director, Genomics and the Future of Public Health Symposium, Atlanta, GA, May 5, 2003).

The purpose of Program Announcement 04143, Centers for

Genomics and Public Health, is to sustain development of the network of Centers for Genomics and Public Health (Centers), and continue to address the integration of genomics into health practice. Centers in the network will function as regional hubs of expertise in genomics and public health. The goal of the Centers network is to facilitate the translation of genomic information into health policy and programs by developing the capacity to: (1) Provide technical assistance to community, state and regional organizations by responding to identified needs and requests for information, assistance and training, and supporting the integration of genomics into population health research, policy and practice; (2) provide competency based training in genomics and population health for the health workforce, with a particular focus on enhancing knowledge and awareness of genomics applications among public health workers; (3) identify opportunities to serve as a credible and impartial provider of current information about genomics, genomic applications and population health, particularly to the public, policy makers and the health community; (4) participate in collaborative processes with other Centers, CDC and external partners; and (5) evaluate the process, achievements and impact of the Centers' activities.

This program addresses the "Healthy People 2010" focus areas of: Workforce, Prevention Research, Data and Information Systems, Public Health Organizations and Resources.

This program is consistent with CDC's agency-wide strategic plan to use genomic information to improve health and prevent disease across the lifespan. Measurable outcomes of the program will be in alignment with the performance goals for the Office of Genomics & Disease Prevention: Development of health workforce.

#### 1.4 Activities

Awardee activities for this program are:

(1) *Provide technical assistance* to community, state and regional public health agencies (e.g., state health departments, including but not limited to those funded under PA #03022, Genomics and Chronic Disease Prevention: [www.cdc.gov/genomics/activities/fund2003.htm](http://www.cdc.gov/genomics/activities/fund2003.htm)) and other health care practitioners (e.g., providers and payers, community organizations) by:

(a) Serving as a source of expertise and information that has immediate or potential relevance in the practice of medicine and public health. For

example, having the ability to provide, or provide access to, current information related to human genome research (e.g., gene-disease associations, gene-environment interactions), genomics and population health (e.g., pharmacogenomics, diagnosis/treatment/prevention of diseases of public health significance), or evidence-based processes for interpretation of scientific developments (e.g., Human Genome Epidemiology {HUGE} reviews or systematic evaluations of genetic tests; [www.cdc.gov/genomics](http://www.cdc.gov/genomics)).

(b) Providing access to practical information from the current knowledge base in formats useful to health practitioners, policy makers and more general audiences, such as topic summaries, fact sheets and information briefs (e.g., Public Health Perspectives: [www.cdc.gov/genomics/info/perspective.htm](http://www.cdc.gov/genomics/info/perspective.htm)). Examples of approaches include identifying content experts, assembling existing materials and evaluating for accuracy and responsiveness to needs, and developing information summaries as needed by extracting, organizing and summarizing information.

(c) Responding to immediate needs and requests for assistance by accessing resources through the Center, the Centers' network, and external partners and community resources.

(d) Developing capacity to seek funding for applied research proposals that will address identified gaps and needs.

(e) Working with community, state and national public health partners and CDC to plan, conduct and evaluate needs assessments related to practice or workforce development (see 2. below).

(f) Convening or participating in workgroups or processes aimed at developing and implementing strategies for integrating genomic information into health care, and public health research, programs and policy (e.g., integrating family history into disease prevention efforts, utilizing existing data sources to identify and analyze population-based data).

(2) *Provide competency-based training* for health professionals, especially the public health workforce, with a focus on practical application of genomics knowledge in population health ([www.cdc.gov/genomics/training/competencies](http://www.cdc.gov/genomics/training/competencies); [www.nchpeg.org/nchpeg.html](http://www.nchpeg.org/nchpeg.html)), by:

(a) Identifying and evaluating existing genomic training materials/tools/modules for suitability in meeting identified needs and requests.

(b) Determining effective educational approaches (e.g., continuing education activities, packaged training modules/

materials, conferences/workshops, web-based or distance learning) and delivering training.

(c) Calling attention to gaps in types or availability of educational materials and training tools identified through the Centers network and partners, and making strategic recommendations to CDC about high priority needs for development of new materials, tools or programs.

(3) Identify and respond to opportunities to serve as a credible and impartial provider of current information about genomics, genomic applications and population health to the public, policy makers, and the health community by:

(a) Supporting proactive educational initiatives at all levels (e.g., community based, K-12, academic, continuing education) aimed at improving understanding of current and potential roles for genomics information in improving health and preventing disease.

(b) Developing resources or approaches for evidence-based response to misleading or inaccurate genomics-related information in the media and on the Internet.

(c) Ensuring that information developed and disseminated by the Centers network and partners provides realistic expectations about the "value" (e.g., efficacy, utility, acceptability, cost-effectiveness) and public health impact of genomic applications and explains how that value is assessed.

(4) Actively participate with CDC, the Centers network and key external partners and collaborators (e.g., states funded to develop genomics capacity) in a consultative process to assess major unmet needs, identify strategies for meeting needs, and classify and prioritize issues and topics of common interest and highest public health importance.

(5) Develop and maintain relationships and collaborations with public, private and academic partners that support the objectives and activities of the network of Centers.

(6) Collaborate with CDC and other partners and investigators to organize meetings/workshops and develop publications (e.g., articles, peer-reviewed papers, contribution to OGDG genomics reports).

(7) Design and implement an evaluation plan that will demonstrate and document measurable progress toward stated objectives, as well as capture information and insights about activities, strategies (e.g., opportunities, successes, barriers) and impact that can be shared among the network of Centers.

In a cooperative agreement, CDC staff is substantially involved in the program activities, above and beyond routine program monitoring. CDC activities for this program are as follows:

(1) Coordinate activities, collaboration and information exchange among the Centers, CDC, other national organizations and agencies, and within the larger health practice community. Disseminate information related to Center and network activities through conferences, workshops and publications.

(2) Convene required meetings to facilitate collaboration and information sharing, and to guide Centers in developing plans consistent with objectives.

(3) Serve as a liaison with other Federal and outside organizations.

(4) Help identify expertise and resources to develop specific products/tools for which a need has been defined, but for which Centers are not funded (e.g., development/production of products/tools requiring multi-specialty expertise and resources).

(5) Conduct onsite visits of Centers to provide consultation and technical support and assist Centers in meeting objectives and requirements of the cooperative agreement.

(6) Monitor and evaluate the Center's progress toward meeting the goals, objectives, timeline and performance evaluation.

## II. Award Information

*Type of Award:* Cooperative Agreement.

CDC involvement in this program is listed in the CDC Activities Section above.

*Fiscal Year Funds:* 2004.

*Approximate Total Funding:* \$2.5 million.

*Approximate Number of Awards:* Up to five.

*Approximate Average Award:* \$500,000 (Amount for the first 12-month period, including both direct and indirect costs).

*Floor of Award Range:* \$400,000.

*Ceiling of Award Range:* \$600,000.

*Anticipated Award Date:* September 1, 2004.

*Budget Period Length:* 12 months.

*Project Period Length:* Four years.

Throughout the project period, CDC's commitment to continuation of awards will be conditioned on the availability of funds, evidence of satisfactory progress by the recipient as documented in required reports and the determination that continued funding is in the best interest of the Federal Government.

## III. Eligibility Information

### III.1 Eligible Applicants

Applications may be submitted by Schools of Public Health (SPH) and other public and private nonprofit organizations, such as: universities, colleges and research institutions.

#### Eligibility Criteria

Applicants must describe and document capacity and capabilities appropriate to the program, including:

- Access to, and well-defined availability of, staff or collaborators with multidisciplinary expertise (public health practice, epidemiology, genomics, clinical genetics and medicine, policy, health communications and education).

- Demonstrated ability to develop educational and practice collaborations among public, private and academic partners, with emphasis on public health and health science institutions, state health departments and other agencies, health care organizations and community groups.

- Experience relevant to the specific objectives and activities of the program, particularly direct involvement with public health practice, improving population health and integrating genomics into practice.

- Expertise in needs assessment and planning and delivering technical assistance and training to public health workers or other health professionals.

More information on the documentation of eligibility can be found in IV.2—Content and Form of Submission. Note that eligibility for the initial (2001) program announcement that formed the network of Centers for Genomics in Public Health was limited to SPH, in part to specifically target state and community program capacity in genomics and population health. SPH provided distinctive qualifications for initiating this program, including health leadership and networking capacity, relevant expertise (e.g., public health and clinical practice, epidemiology, genomics, health education), familiarity with public health practice and population health programs and experience developing and delivering training to the public health workforce.

For the 2004 program announcement, institutions and organizations listed above in III.1—Eligible Applicants (including those that are not SPH) are invited to submit applications, but specific capacity must be demonstrated as discussed above.

### III.2 Cost Sharing or Matching

Matching funds are not required for this program.

### III.3 Other

If the application is incomplete or non-responsive, or a funding amount greater than the ceiling of the award range is requested, it will not be entered into the review process. Applicants will be notified that their application did not meet the submission requirements.

**Note:** Title 2 of the United States Code section 1611 states that an organization described in section 501(c)(4) of the Internal Revenue Code that engages in lobbying activities is not eligible to receive Federal funds constituting an award, grant, or loan.

## IV. Application and Submission Information

### IV.1 Address To Request Application Package

To apply for this funding opportunity use application form PHS 5161.

Application forms and instructions are available on the CDC Web site, at the following Internet address:

[www.cdc.gov/od/pgo/forminfo.htm](http://www.cdc.gov/od/pgo/forminfo.htm).

If applicants do not have access to the Internet, or if applicants have difficulty accessing the forms on-line, they may contact the CDC Procurement and Grants Office Technical Information Management Section (PGO-TIM) staff at 770-488-2700. Application forms can be mailed to applicants.

### IV.2 Content and Form of Submission

**Letter of Intent (LOI):** CDC requests that applicants send a LOI if they intend to apply for this program, PA #04143 Centers for Genomics and Public Health. The LOI is not legally binding and will not be evaluated. It is requested from potential applicants to assist CDC in planning for the program application review. Applicants may use the LOI template provided in Appendix A (Appendix A can be viewed, along with the full program announcement, on the CDC Web site at: <http://www.cdc.gov/od/pgo/funding/grantmain.htm>) or provide an LOI in the following format:

- Maximum of two pages;
- Single-spaced;
- One inch margins;
- 12-point unrounded font;
- 8.5 by 11 inch paper;
- Printed only on one side.

The LOI must contain the following information:

- Program Announcement number and title;
- Institution name and location;
- Name, address, telephone and fax numbers, and e-mail address of a contact person from the applicant institution;
- Name of the Principal Investigator and brief description of the applicant's professional activity focus (three to four lines).

Do not include attachments. The deadline for receiving the LOI will be May 17, 2004.

**Application:** The applicant must submit a project narrative with the application forms. Each narrative must be submitted in the following format:

- Maximum number of pages: 25.

The narrative should be no more than 25 clearly numbered pages. Federal forms, table of contents, abstract, budget, budget justifications and appendices are not counted toward the narrative page limit. If the narrative exceeds the page limit, only the first 25 pages will be reviewed. Utilize the following format:

- 12 point unrounded font;
- 8.5 by 11 inch paper, printed only on one side;
- Double spaced;
- One inch margins;
- Held together only by rubber bands or metal clips.

The narrative should address activities to be conducted over the entire project period, and must include the following items in the order listed:

- Abstract—A one-page, single-spaced abstract of the narrative with a heading that includes the title, organization, name and address of the project director, telephone and fax numbers and e-mail address.
- Table of Contents.
- Background—(1) Provide background that illustrates understanding of the translation continuum from human genome research to integration of genomics information into health practice, particularly the strategies for integrating knowledge into programs and workforce capacity that form the basis of the program. (2) Justify the need(s) for the proposed activities, and describe the relevance of expected outcomes to the Purpose of the Announcement.

• Relevant Resources and Experience—(1) Describe available facilities and infrastructure, technological capacity and other resources, and document institutional commitment to support of the Center; (2) Describe and document (*e.g.*, publications, products, presentations) prior or current experience, such as related projects and collaborations, or genomics and population health research capacity, that is relevant to the purpose and proposed activities of this cooperative agreement; (3) Address specific capacity and capability criteria as described in the eligibility requirements (sections III.1 and III.3).

- Proposed Staffing—(1) Provide a biographical sketch for the Principal Investigator/Program Director and all key personnel. (2) Provide a description

of all project staff, regardless of their funding source, that includes: title, qualifications, experience, responsibilities, minimum percentage of time to be devoted to the project and the proportion of the salary to be paid by the cooperative agreement. (3) Provide a timetable for the recruitment and hiring of proposed additional qualified staff and an organizational chart that illustrates the staffing plan.

- Work Plan—Applicants should provide a detailed work plan that describes their current ability to address each of the elements in the “Recipient Activities” section of this announcement, as well as their specific plans for developing additional capacity over the project period. Applicants are also encouraged to propose unique initiatives/approaches based on their interests and expertise that are relevant to and/or build upon one or more of these activities. The Work Plan should: (1) Provide specific, measurable and time-framed objectives for proposed responses to the “Recipient Activities.” (2) Describe proposed methods and approaches by which the objectives will be achieved. (3) Present a timeline for activities and objectives over the project period. (4) Provide a description of the involvement of other entities in the proposed project, including academic, private and public partners (particularly state and local health departments, health organizations and community groups), with a clear statement of roles and commitment of time that are reflected in attached letters of support. Be sure to distinguish activities and outcomes of joint and/or overlapping projects supported through other sources. (5) Describe proposed performance measures, products or other quantifiable outcomes for each activity and objective.

- Evaluation—Describe plans for establishing a four-year Center-level evaluation protocol. Include evaluation goals, resources and infrastructure to develop/support the plan: how project partners and communities served will provide input in plan development, an implementation timeline and a visual representation that depicts specific activities and outcomes (*e.g.*, flow diagram, table, logic model: <http://www.wkkf.org>). The evaluation protocol should be capable of documenting measurable progress toward specific objectives, activities and projected outcomes outlined in the work plan, as well as demonstrating the degree to which strategies and programs were delivered as intended, their effectiveness in achieving desired results, successful collaborations with public health and other partners,

lessons learned and how evaluation results will be used to improve the overall impact of the Centers.

- Budget—Provide a detailed budget for year one of the cooperative agreement and budget projections for subsequent years. Include travel for two persons to attend an annual two-day meeting in Atlanta.

- Budget Justification—Provide a narrative that includes justification for all requested costs, including personnel (*i.e.*, name, position title, annual salary, percentage of time and effort, amount requested) and consultants (as above plus period of performance and scope of work).

Additional information should be included in the application appendices. The appendices will not be counted toward the narrative page limit. This additional information includes:

- Curriculum vitae/resumes/biosketches;
- Letters of support (required);
- Organizational charts, evaluation models.

Questions that arise during the application process should be clearly stated and emailed to Dr. Myers at the Office of Genomics and Disease Prevention ([MFMyers@cdc.gov](mailto:MFMyers@cdc.gov)). Responses will be generated by program staff and made available for all applicants to view. The questions and answers will be posted at least weekly at: [www.cdc.gov/genomics/RFA2004questions.htm](http://www.cdc.gov/genomics/RFA2004questions.htm). Applicants may submit their questions in this format only.

Applicants are required to have a Dun and Bradstreet Data Universal Numbering System (DUNS) number to apply for a grant or cooperative agreement from the Federal government. The DUNS number is a nine-digit identification number, which uniquely identifies business entities. Obtaining a DUNS number is easy and there is no charge. To obtain a DUNS number, access [www.dunandbradstreet.com](http://www.dunandbradstreet.com) or call 1-866-705-5711.

For more information, see the CDC Web site at: <http://www.cdc.gov/od/pgo/funding/pubcomm.htm>.

If the application form does not have a DUNS number field, the applicant should write the DUNS number at the top of the first page of the application, and/or include the DUNS number in the application cover letter.

Additional requirements that may require the applicant to submit additional documentation with the application are listed in section “VI.2. Administrative and National Policy Requirements.”

### IV.3 Submission Dates and Times

*LOI Deadline Date:* May 17, 2004.

*Application Deadline Date:* June 15, 2004.

#### *Explanation of Deadlines:*

Applications must be received in the CDC Procurement and Grants Office by 4 p.m. eastern time on the deadline date. If the application is sent by the United States Postal Service or commercial delivery service, the applicant must ensure that the carrier will be able to guarantee delivery of the application by the closing date and time. If CDC receives the application after closing due to: (1) Carrier error, when the carrier accepted the package with a guarantee for delivery by the closing date and time, or (2) significant weather delays or natural disasters, the applicant will be given the opportunity to submit documentation of the carrier's guarantee. If the documentation verifies a carrier problem, CDC will consider the application as having been received by the deadline.

This announcement is the definitive guide on application submission address and deadline. It supersedes information provided in the application instructions. If the application does not meet the deadline above, it will not be eligible for review, and will be discarded. The applicants will be notified that their application did not meet the submission requirements.

CDC will not notify the applicant upon receipt of the application. If the applicant has a question about the receipt of the application, first contact the courier. If the applicant still has a question, contact the PGO-TIM staff at: 770-488-2700. Before calling, please wait two to three days after the application deadline. This will allow time for applications to be processed and logged.

### IV.4 Intergovernmental Review of Applications

Executive Order 12372 does not apply to this program.

### IV.5 Funding Restrictions

Restrictions, which must be taken into account while writing your budget, are as follows:

- Use of Funds—Cooperative agreement funds may not be used to support the provision of direct patient care, for facility or capital outlay, or to conduct research involving human subjects.
- Awards will not allow reimbursement of pre-award costs.
- Funds should not be allocated to develop/produce new training products/tools, such as CD-ROMs or on-line

training. See Sections on Recipient Activities (3) and I.4, (2) c.

If indirect costs are requested in the budget, a copy of all indirect cost rate agreements must be included. If the indirect cost rate is a provisional rate, the agreement should be less than 12 months of age.

Guidance for completing the budget can be found on the CDC Web site, at the following Internet address: <http://www.cdc.gov/od/pgo/funding/budgetguide.htm>.

### IV.6 Other Submission Requirements

*LOI Submission Address:* Submit your LOI by express mail, delivery service, fax, or e-mail to: Melanie F. Myers, Ph.D., Office of Genomics and Disease Prevention, Office of the Director, Centers for Disease Control and Prevention, 1600 Clifton Road, NE., Mail Stop E-82, Atlanta, GA 30333, fax: 404-498-1444, e-mail: [MFMyers@cdc.gov](mailto:MFMyers@cdc.gov).

*Application Submission Address:* Submit the original and two hard copies of your application by mail or express delivery service to: Technical Information Management—PA #04143, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341. Applications may not be submitted electronically at this time.

## V. Application Review Information

### V.1 Criteria

Applicants are required to provide measures of effectiveness that relate to the goal stated in the "Purpose" section (I.3) of this announcement and will demonstrate the accomplishment of the various identified objectives and activities of the cooperative agreement. Measures must be objective and quantitative, and must measure the intended outcome(s) (as described in the Work Plan and Evaluation Plan, section IV.2). These measures of effectiveness must be submitted with the application and will be one element in the evaluation of the full proposal described below.

Note that the criteria below are listed in descending order by weight. Applicants do not need to utilize this weighted order in preparing the narrative (see IV.2 for guidance on content).

Applications will be evaluated against the following criteria:

- Work Plan (25 Points):  
Does the applicant adequately describe a work plan for achieving the proposed objectives?
- Does the applicant provide specific, measurable and time-framed objectives for each of the recipient activities?

Is there a realistic timeline and adequate allocation of resources for major activities?

Does the applicant adequately support the proposed approaches and methodology to carry out project activities?

Are projected products and outcomes clearly defined?

Does the applicant adequately describe relationships with public health, health care and academic partners, including defined roles and levels of commitment to this proposal, and methods for establishing and maintaining these relationships?

Were all appropriate letters of support provided?

- Relevant Experience (20 Points):  
Does the demonstrated experience of the applicant team and partners support their ability to accomplish the proposed objectives and activities?

Does the applicant demonstrate their ability and willingness to successfully participate in collaborative activities?

How well does the applicant describe and document the principal investigator's experience and expertise, including project oversight, collaboration(s) with the health practice community and a track record of producing results and reports for publication?

- Staffing (20 Points):  
Does the applicant provide a staffing plan that includes defined roles, relevant expertise and experience, percentage effort of key personnel and timetable for any planned recruitment?

Does the applicant provide an organizational chart that illustrates internal and external relationships?

How well do the organizational chart and staffing plan support the proposed objectives and activities?

Have the principal investigator and other key personnel obligated a sufficient amount of time to support the proposed roles?

Is the PI's authority and responsibility for carrying out the proposed project clearly defined?

- Resources (15 Points):  
How well does the applicant describe the institutional commitment to the development of the Center (e.g., facilities, technological capacity, other resources)?

Is the commitment and allocation of fiscal and professional resources adequate to support the proposal?

How well does the applicant describe and document commitment of academic, public and private partners and collaborators?

- Evaluation Plan (10 Points):

Does the applicant provide a comprehensive four-year evaluation

plan, including clearly stated objectives?

Does the evaluation plan support measurement of progress toward the achievement of time-framed objectives and planned activities?

Does the evaluation plan support the ability to gather information about the Center development process?

- Background (10 Points):

Does the applicant display an understanding of the genome research to practice continuum and how proposed activities will facilitate translation of knowledge to practice?

Does the applicant demonstrate understanding of public health and health practice, and the need to incorporate genomics capacity into population health programs?

Does the applicant clearly explain the relevance of the proposed recipient activities (section I.4) to the Purpose of the Announcement (I.3)?

- Budget (Reviewed, but not Scored):

Is the budget submitted by the applicant detailed, clear, justified and consistent with proposed program activities?

## VI.2 Review and Selection Process

Applications will be reviewed for completeness by the Procurement and Grants Office (PGO) staff, and for responsiveness by OGD. Incomplete applications and applications that are non-responsive to the eligibility criteria will not advance through the review process. Applicants will be notified that their application did not meet submission requirements.

An objective review panel will evaluate complete and responsive applications according to the criteria listed in the "V.1. Criteria" section above.

In addition, the following factors may affect the funding decision: Maintenance of geographic diversity.

## V.3 Anticipated Announcement and Award Dates

September 1, 2004.

## VI. Award Administration Information

### VI.1 Award Notices

Successful applicants will receive a Notice of Grant Award (NGA) from the CDC Procurement and Grants Office. The NGA shall be the only binding, authorizing document between the recipient and CDC. The NGA will be signed by an authorized Grants Management Officer, and mailed to the recipient fiscal officer identified in the application.

Unsuccessful applicants will receive notification of the results of the application review by mail.

### VI.2 Administrative and National Policy Requirements 45 CFR part 74 and part 92.

For more information on the Code of Federal Regulations, see the National Archives and Records Administration at the following Internet address: <http://www.accessgpo.gov/nara/cfr/cfr-table-search.html>

The following additional requirements apply to this project:

- AR-8 Public Health System Reporting Requirements
- AR-10 Smoke-Free Workplace Requirements
- AR-11 Healthy People 2010;
- AR-12 Lobbying Restrictions;
- AR-14 Accounting System Requirements;
- AR-15 Proof of Non-profit Status;
- AR-20 Conference Support;
- AR-24 Health Insurance Portability and Accountability Act Requirements.

### VI.3 Reporting Requirements

The applicant must provide CDC with an original, plus two hard copies, of the following reports:

- (1) Annual interim progress report (no less than 90 days before the end of the budget period). The progress report will serve as your non-competing continuation application, and must contain the following elements:
  - a. Current Budget Period Activities Objectives;
  - b. Current Budget Period Financial Progress;
  - c. New Budget Period Program Proposed Activity Objectives;
  - d. Budget;
  - e. Additional Requested Information;
  - f. Measures of Effectiveness.
- (2) Financial status report, (no more than 90 days after the end of the budget period) and semi-annual progress report by March 15 of each funding year.
- (3) Final financial and performance reports (no more than 90 days after the end of the project period).

These reports must be mailed to the Grants Management or Contract Specialist listed in the "Agency Contacts" section of this announcement.

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## VII. Agency Contacts

Technical questions that arise during the application process should be clearly stated and e-mailed to Dr. Myers at the Office of Genomics and Disease Prevention ([MFMymers@cdc.gov](mailto:MFMymers@cdc.gov)). Responses will be generated by program staff and made available for all applicants to view. The questions and answers will be posted at least weekly at: [www.cdc.gov/genomics/RFA2004questions.htm](http://www.cdc.gov/genomics/RFA2004questions.htm). Applicants may

submit their questions in this format only.

For general questions about this announcement, contact: Technical Information Management Section, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341, telephone number: 770-488-2700.

For grants management, or budget assistance, contact: Mattie Jackson, Grants Management Specialist, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341, telephone number: 770-488-2696, e-mail: [mij3@cdc.gov](mailto:mij3@cdc.gov).

For program technical assistance, contact: Melanie F. Myers, Ph.D., Office of Genomics and Disease Prevention, Office of the Director, Centers for Disease Control and Prevention, 1600 Clifton Road, NE., Mail Stop E-82, Atlanta, GA 30333, e-mail: [MFMymers@cdc.gov](mailto:MFMymers@cdc.gov).

Dated: April 9, 2004.

**William P. Nichols,**

Acting Director, Procurement and Grants Office, Centers for Disease Control and Prevention.

[FR Doc. 04-8637 Filed 4-15-04; 8:45 am]

**BILLING CODE 4163-18-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

### Mine Safety and Health Research Advisory Committee

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), the Centers for Disease Control and Prevention (CDC) announces the following committee meeting.

**Name:** Mine Safety and Health Research Advisory Committee (MSHRAC).

**Times and Dates:** 8:30 a.m.–5 p.m., May 20, 2004. 8:30 a.m.–11:30 a.m., May 21, 2004.

**Place:** The Holiday Inn on The Hill, 415 New Jersey Avenue, NW., Washington, DC, 20001, telephone (202)638-1616, fax (202) 347-1813.

**Status:** Open to the public, limited only by the space available. The meeting room accommodates approximately 40 people.

**Purpose:** This committee is charged with providing advice to the Secretary, Department of Health and Human Services; the Director, CDC; and the Director, NIOSH, on priorities in mine safety and health research, including grants and contracts for such research, 30 U.S.C. 812(b)(2), Section 102(b)(2).

*Matters To Be Discussed:* Agenda for this meeting will focus on reports from the Director, NIOSH and Associate Director for Mining, regarding research plans for powered haulage, diesel controls and retrofitting engineering noise controls, mine fires and explosions, various reports and plans for the mining industry health and safety.

Agenda items are subject to change as priorities dictate.

**FOR FURTHER INFORMATION CONTACT:**

Lewis V. Wade, Ph.D., Executive Secretary, MSHRAC, NIOSH, CDC, 200 Independence Avenue, SW., Room 715-H, Hubert Humphrey Building, P12 Washington, DC 20201-004, telephone (202) 401-2192, fax (202) 260-4464.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities for both CDC and the Agency for Toxic Substances and Disease Registry.

Dated: April 12, 2004.

**Joseph E. Salter,**

*Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.*

[FR Doc. 04-8640 Filed 4-15-04; 8:45 am]

**BILLING CODE 4163-19-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

#### Board of Scientific Counselors, National Center for Infectious Diseases

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), the Centers for Disease Control and Prevention (CDC) announces the following committee meeting.

*Name:* Board of Scientific Counselors, National Center for Infectious Diseases (NCID).

*Times and Dates:* 9 a.m.—5:30 p.m., May 13, 2004. 8:30 a.m.—2 p.m., May 14, 2004.

*Place:* CDC, Auditorium B, Building 1, 1600 Clifton Road, Atlanta, Georgia 30333.

*Status:* Open to the public, limited only by the space available.

*Purpose:* The Board of Scientific Counselors, NCID, provides advice and guidance to the Director, CDC, and Director, NCID, in the following areas: program goals and objectives; strategies; program organization and resources for infectious disease prevention and control; and program priorities.

*Matters To Be Discussed:* Agenda items will include:

1. Opening Session: NCID Update
2. Futures Initiative Update
3. Environmental Microbiology
4. IT Consolidations/Bioinformatics Center
5. Veterinary-Human Public Health Interface
6. Global Disease Detection Initiative
7. Topic Updates
  - a. Influenza
  - b. Pneumococcal Disease
  - c. Genetics Initiatives
8. Board meets with Director, CDC

Other agenda items include announcements/introductions; follow-up on actions recommended by the Board December 2003; consideration of future directions, goals, and recommendations.

Agenda items are subject to change as priorities dictate.

Written comments are welcome and should be received by the contact person listed below prior to the opening of the meeting.

*For Further Information Contact:* Tony Johnson, Office of the Director, NCID, CDC, Mailstop E-51, 1600 Clifton Road, NE., Atlanta, Georgia 30333, e-mail [tjohnson3@cdc.gov](mailto:tjohnson3@cdc.gov); telephone 404/498-3249.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both CDC and the Agency for Toxic Substances and Disease Registry.

Dated: April 12, 2004.

**Joseph E. Salter,**

*Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.*

[FR Doc. 04-8639 Filed 4-15-04; 8:45 am]

**BILLING CODE 4163-18-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. 2004N-0161]

#### Agency Information Collection Activities; Proposed Collection; Comment Request; Information From United States Processors That Export to the European Community

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information and to allow 60 days for public comment in response to the

notice. This notice solicits comments on reporting requirements in implementing the European Union Dairy Export List.

**DATES:** Submit written or electronic comments on the collection of information by June 15, 2004.

**ADDRESSES:** Submit electronic comments to: <http://www.fda.gov/dockets/ecomments>. Submit written comments to the Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

**FOR FURTHER INFORMATION CONTACT:**

Peggy Robbins, Office of Management Programs (HFA-250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-827-1223.

**SUPPLEMENTARY INFORMATION:** Under the PRA (44 U.S.C. 3501-3520) Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. "Collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

**Request for Information From U.S. Processors That Export to the European Community—(OMB Control Number 0910-0320)—Extension**

The European Community (EC) is a group of 15 European countries (with 10 additional countries joining on May 1, 2004), that have agreed to harmonize their commodity requirements to facilitate commerce among member States. EC legislation for intraEC trade has been extended to trade with nonEC countries, including the United States. For certain food products, including those listed in this document, EC legislation requires assurances from the responsible authority of the country of origin that the processor of the food is in compliance with applicable regulatory requirements.

With the assistance of trade associations and State authorities, FDA requests information from processors

that export certain animal-derived products (e.g., shell eggs, dairy products, game meat, game meat products, animal casings, and gelatin) to EC. FDA uses the information to maintain lists of processors that have demonstrated current compliance with U.S. requirements and provides the lists to EC quarterly. Inclusion on the list is voluntary. EC member countries refer to the lists at ports of entry to verify that products offered for importation to EC from the United States are from processors that meet U.S. regulatory requirements. Products processed by firms not on the list are subject to detention and possible refusal at the port. FDA requests the following information from each processor:

1. Business name and address;
2. Name and telephone number of person designated as business contact;

3. Lists of products presently being shipped to EC and those intended to be shipped in the next 6 months;

4. Name and address of manufacturing plants for each product;

5. Names and affiliations of any Federal, State, or local governmental agencies that inspect the plant, government-assigned plant identifier such as plant number, and last date of inspection; and

6. Assurance that the firm or individual representing the firm and submitting a certificate for signature to FDA is aware of and knows that they are subject to the provisions of 18 U.S.C 1001. This law provides that it is a criminal offense to knowingly and willfully make a false statement or alter or counterfeit documents in a matter within the jurisdiction of a U.S. agency.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN<sup>1</sup>

| Products                    | No. of Respondents | No. Of Responses per Respondent | Total Annual Responses | Hours per Response | Total Hours |
|-----------------------------|--------------------|---------------------------------|------------------------|--------------------|-------------|
| Shell Eggs                  | 10                 | 1                               | 10                     | 0.25               | 3           |
| Dairy                       | 100                | 1                               | 100                    | 0.25               | 25          |
| Game Meat and Meat Products | 5                  | 1                               | 5                      | 0.25               | 1           |
| Animal Casings              | 5                  | 1                               | 5                      | 0.25               | 1           |
| Gelatin                     | 3                  | 1                               | 3                      | 0.25               | 1           |
| Collagen                    | 3                  | 1                               | 3                      | 0.25               | 1           |
| Total                       |                    |                                 |                        |                    | 32          |

<sup>1</sup> There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2.—ESTIMATED ANNUAL REPORTING BURDEN; DISCLOSURE<sup>1</sup>

| Respondent        | No. of Respondents | No. of Responses per Respondent | Total annual Responses | Hours per Response | Total Hours |
|-------------------|--------------------|---------------------------------|------------------------|--------------------|-------------|
| Trade Association | 15                 | 1                               | 15                     | 8                  | 120         |
| State             | 50                 | 1                               | 50                     | 8                  | 400         |
| Total             |                    |                                 |                        |                    | 520         |

<sup>1</sup> There are no capital costs or operating and maintenance costs associated with this collection of information.

It is estimated that the annual reporting burden would be no more than 32 hours. The time to respond to the questions should take approximately 15 minutes using any of the technologies available to transmit the information. All of the information asked for should be readily available. The number of respondents is a rough estimate based on volume of exports and responses received to date. No record retention is required. Therefore, the proposed annual burden for this information collection is 32 hours.

Dated: April 9, 2004.

**Jeffrey Shuren,**

*Assistant Commissioner for Policy.*

[FR Doc. 04-8611 Filed 4-15-04; 8:45 am]

BILLING CODE 4160-01-S

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Food and Drug Administration**

[Docket No. 2003N-0267]

**Agency Information Collection Activities; Announcement of OMB Approval; Postmarketing Studies for Human Drugs and Licensed Biological Products; Status Report**

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing that a collection of information entitled "Postmarketing Studies for Human Drugs and Licensed Biological Products;

Status Report" has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

**FOR FURTHER INFORMATION CONTACT:**

JonnaLynn P. Capezzuto, Office of Information Resources Management (HFA-250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-827-4659.

**SUPPLEMENTARY INFORMATION:** In the **Federal Register** of January 16, 2004 (69 FR 2601), the agency announced that the proposed information collection had been submitted to OMB for review and clearance under 44 U.S.C. 3507. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control

number. OMB has now approved the information collection and has assigned OMB control number 0910-0433. The approval expires on March 31, 2007. A copy of the supporting statement for this information collection is available on the Internet at <http://www.fda.gov/ohrms/dockets>.

Dated: April 9, 2004.

**Jeffrey Shuren,**

*Assistant Commissioner for Policy.*

[FR Doc. 04-8612 Filed 4-15-04; 8:45 am]

BILLING CODE 4160-01-S

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket Nos. 1976N-0151 and 1977N-0203]

#### **Isocarboxazid; Drugs for Human Use; Drug Efficacy Study Implementation; Revocation of Exemption; Announcement of Marketing Conditions; Followup Notice; and Opportunity for Hearing**

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is revoking the temporary exemption that has allowed isocarboxazid products to remain on the market beyond the time limits scheduled for implementation of the Drug Efficacy Study. FDA announces the conditions for marketing this product for the indication now regarded as effective. Isocarboxazid, a monoamine oxidase inhibitor, is used in the treatment of depression.

**DATES:** The revocation of exemption is effective April 16, 2004. Requests for hearing are due by May 17, 2004; information to justify a hearing is due by June 15, 2004.

**ADDRESSES:** Communications in response to this document are to be identified with reference number Drug Efficacy Study Implementation (DESI) 11961, and directed to the attention of the appropriate office listed in the following paragraphs.

*Original abbreviated new drug applications (ANDAs):* Office of Generic Drugs (HFD-600), Center for Drug Evaluation and Research, Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855.

*Requests for hearing:* (identify with docket numbers found in the heading of this document): Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

*Requests for opinion of the applicability of this document to a specific product:* Division of New Drugs and Labeling Compliance (HFD-310), Center for Drug Evaluation and Research, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857.

#### **FOR FURTHER INFORMATION CONTACT:**

Mary Catchings, Center for Drug Evaluation and Research (HFD-7), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-594-2041.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

The following new drug application (NDA) is the subject of this document:

NDA 11-961; MARPLAN Tablets containing isocarboxazid, 10 milligrams (mg); Oxford Pharmaceutical Services, Inc., One U.S. Highway 46 West, Totowa, NJ 07512 (formerly held by Roche Laboratories (Roche), Division of Hoffman-LaRoche, Inc., Nutley, NJ 07110).

In a document published in the **Federal Register** of July 9, 1966 (31 FR 9426), all holders of NDAs that became effective before October 10, 1962, on the basis of a showing of safety, were requested to submit to FDA reports containing the best data available in support of the effectiveness of their products for the claimed indications. Roche, then the holder of NDA 11-961, did not submit data on MARPLAN. Consequently, MARPLAN was not included in the initial phase of the DESI review, that is, the review conducted by the National Academy of Sciences-National Research Council. Nevertheless, FDA reviewed available information on MARPLAN, including information subsequently submitted by Roche, and concluded that substantial evidence of effectiveness of the drug was lacking. Accordingly, in the **Federal Register** of October 5, 1976 (41 FR 43938), the agency issued a notice of opportunity for hearing (NOOH) on a proposal to withdraw approval of NDA 11-961 for MARPLAN Tablets.

In response to the October 1976 document, Roche submitted evidence to document a medical need for MARPLAN and indicated it was making arrangements to conduct the necessary studies to determine the effectiveness of the drug.

In a document published in the **Federal Register** of July 14, 1978 (43 FR 30351), FDA temporarily exempted isocarboxazid from the time limits established for completing the DESI program (paragraph XIV, category XX exemption). The exemption allowed the

drug to remain on the market pending completion and review of additional clinical studies to determine its effectiveness. The July 1978 exemption document established conditions for marketing isocarboxazid, including a requirement that the drug be labeled as probably effective for severe reactive or endogenous depression. That document also required ANDAs for duplicate products covered by the exemption and established a schedule for the submission of protocols, and for the initiation and completion of studies. Accordingly, in the same issue of the **Federal Register** (43 FR 30350), FDA published a document rescinding the 1976 NOOH for MARPLAN.

In a **Federal Register** document of August 28, 1979 (44 FR 50409), FDA amended the previously published conditions for marketing isocarboxazid specified in the July 1978 exemption document (43 FR 30351). The amended conditions required that isocarboxazid be labeled as probably effective for the treatment of depressed patients who are refractory to tricyclic antidepressants or electroconvulsive therapy and depressed patients in whom tricyclic antidepressants are contraindicated. The August 1979 document also extended the time limits for submitting protocols and for completing studies on isocarboxazid.

On the basis of the agency's review of additional data and information submitted by the holder of NDA 11-961, the Director of the Center for Drug Evaluation and Research (CDER) has determined that isocarboxazid (MARPLAN) is effective for the treatment of depression. A supplement to NDA 11-961 providing for this indication was approved in 1998. Isocarboxazid is no longer entitled to the temporary exemption announced in 1978. Accordingly, the exemption, as it pertains to isocarboxazid, is hereby revoked.

No other monoamine oxidase inhibitor remains exempt under the paragraph XIV, category XX exemption, and category XX is now dissolved.

Isocarboxazid is regarded as a new drug under section 201(p) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 321(p)), and an approved application, under section 505 of the act (21 U.S.C. 355), is required for marketing an isocarboxazid product.

In addition to the product specifically named in the previous paragraphs, this document applies to any product that is not the subject of an approved application and is identical to the product named previously. The document may also be applicable, under § 310.6 (21 CFR 310.6), to a similar or

related drug product that is not the subject of an approved application. It is the responsibility of every drug manufacturer or distributor to review this document and to determine whether it covers any drug product that the person manufactures or distributes. Any person may request an opinion of the applicability of this document to a specific drug product by writing to the Division of New Drugs and Labeling Compliance (see **ADDRESSES**).

## II. Conditions for Approval and Marketing

### A. Effectiveness Classification

FDA has reviewed all available evidence and concludes that isocarboxazid is effective for the indication in the labeling conditions listed in the following sections. The drug product lacks substantial evidence of effectiveness for other labeled indications.

### B. Conditions for Approval and Marketing

FDA is prepared to approve ANDAs referencing MARPLAN for products containing isocarboxazid for the indication now regarded as effective.

#### 1. Form of Drug

The drug product is in tablet form for oral administration. Each tablet contains isocarboxazid, 10 mg.

#### 2. Labeling Conditions

a. *The label bears the statement "Rx only".*

b. The drug is labeled to comply with all requirements of the act and FDA's regulations, and the labeling bears adequate information for safe and effective use of the drug. The indication is as follows:

Isocarboxazid is indicated for the treatment of depression. Because of its potentially serious side effects, isocarboxazid is not an antidepressant of first choice in the treatment of newly diagnosed depressed patients.

The efficacy of isocarboxazid in the treatment of depression was established in 6-week controlled trials of depressed outpatients. These patients had symptoms that corresponded to the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) category of major depressive disorder; however, they often also had signs and symptoms of anxiety (anxious mood, panic, and/or phobic symptoms). (See Clinical Pharmacology.)

A major depressive episode (DSM-IV) implies a prominent and relatively persistent (nearly every day for at least 2 weeks) depressed or dysphoric mood that usually interferes with daily functioning, and includes at least five of the following nine symptoms: depressed mood, loss of interest in usual activities, significant change in weight and/or appetite, insomnia or hypersomnia, psychomotor agitation or retardation, increased fatigue, feelings of

guilt or worthlessness, slowed thinking or impaired concentration, and a suicide attempt or suicidal ideation.

The antidepressant effectiveness of isocarboxazid in hospitalized depressed patients, or in endogenomorphically retarded and delusionally depressed patients, has not been adequately studied.

The effectiveness of isocarboxazid in long-term use, that is, for more than 6 weeks, has not been systematically evaluated in controlled trials. Therefore, the physician who elects to use isocarboxazid for extended periods should periodically evaluate the long-term usefulness of the drug for the individual patient.

#### 3. Marketing Status

For unapproved products, approval of an ANDA must be obtained in accordance with section 505(j) of the act before marketing such products. Marketing prior to approval of an ANDA will subject such products, and those persons who caused the products to be marketed, to regulatory action.

## III. Notice of Opportunity for Hearing

Notice is given to the holder of the NDA and to all other interested persons that the Director of CDER proposes to issue an order under section 505(e) of the act withdrawing approval of the NDA and all amendments and supplements thereto providing for indications that lack substantial evidence of effectiveness (i.e., indications not referred to in section II.B.2.b of this document). The basis of the proposed action is that new information before the Director of CDER with respect to the drug product, evaluated together with the evidence available to the Director of CDER when the application was approved, shows there is a lack of substantial evidence that the drug product will have all the effects it claims or is represented to have under the conditions of use prescribed, recommended, or suggested in the labeling for indications not referred to in section II.B.2.b of this document. If no hearing is requested, then approval of the claims that lack evidence of effectiveness will be considered withdrawn, and no further order will issue.

This notice of opportunity for hearing encompasses all issues relating to the legal status of the drug product subject to it (including identical, related, or similar drug products as defined in § 310.6), e.g., any contention that any such product is not a new drug because it is generally recognized as safe and effective within the meaning of section 201(p) of the act or because it is exempt from part or all of the new drug provisions of the act under the exemption for products marketed before June 25, 1938, in section 201(p) of the

act, or under section 107(c) of the Drug Amendments of 1962 (Public Law 87-781), or for any other reason.

In accordance with section 505 of the act and the regulations issued under that section (21 CFR part 310 and part 314 (21 CFR part 314)), an applicant and all other persons who manufacture or distribute a drug product that is identical, related, or similar to a drug product named in this document (§ 310.6) and not the subject of an NDA are hereby given an opportunity for a hearing to show why approval of those portions of the NDA providing for indications that lack substantial evidence of effectiveness should not be withdrawn, and an opportunity to raise, for administrative determination, all issues relating to the legal status of the drug product named above and of all identical, related, or similar drug products not the subject of an NDA.

The applicant or any other person subject to this document under § 310.6 who decides to seek a hearing shall file: (1) A written notice of appearance and request for hearing (see **DATES**), and (2) the data, information, and analyses relied on to justify a hearing, as specified in § 314.200 (see **DATES**). Any other interested person may also submit comments on this proposal to withdraw approval. The procedures and requirements governing this notice of opportunity for hearing; a notice of appearance and request for hearing; a submission of data, information, and analyses to justify a hearing; other comments; and a granting or denial of a hearing are contained in § 314.200 and in 21 CFR part 12.

The failure of the applicant or any other person subject to this notice under § 310.6 to file a timely written notice of appearance and request for hearing, as required by § 314.200, constitutes an election by the person not to make use of the opportunity for a hearing concerning the action proposed and a waiver of any contentions concerning the legal status of that person's drug product. Any such drug product labeled for the indications referred to in this notice as lacking substantial evidence of effectiveness may not thereafter lawfully be marketed, and the FDA will initiate appropriate regulatory action to remove such drug product from the market. Any new drug product marketed without an approved NDA is subject to regulatory action at any time.

A request for a hearing may not rest upon mere allegations or denials, but must present specific facts showing that there is a genuine and substantial issue of fact that requires a hearing. If it conclusively appears from the face of the data, information, and factual

analyses in the request for hearing that there is no genuine and substantial issue of fact which precludes the withdrawal of approval of the application, or when a request for hearing is not made in the required format or with the required analyses, the Commissioner of Food and Drugs will enter summary judgment against the person(s) who requests the hearing, making findings and conclusions, and denying a hearing.

All submissions under this notice of opportunity for a hearing are to be filed in four copies. Except for data and information prohibited from public disclosure under 21 U.S.C. 331(j) or 18 U.S.C. 1905, the submissions may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

This notice is issued under the Federal Food, Drug, and Cosmetic Act (secs. 502, 505 (21 U.S.C. 352, 355)) and under the authority delegated to the Director, Center for Drug Evaluation and Research (21 CFR 5.100).

Dated: April 6, 2004.

**Jeffrey Shuren,**

*Assistant Commissioner for Policy.*

[FR Doc. 04-8658 Filed 4-15-04; 8:45 am]

BILLING CODE 4160-01-S

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Substance Abuse and Mental Health Services Administration

#### Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish a summary of information collection requests under OMB review, in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these documents, call the SAMHSA Reports Clearance Officer on (301) 443-7978.

Pilot Testing of Outcome Measures in Programs Providing Services to Persons Who are Homeless and Have Serious Mental Illnesses—New—SAMHSA's Center for Mental Health Services (CMHS) provides funds to states and territories to provide services to individuals who are homeless and have serious mental illnesses. These services enable persons who are homeless and have serious mental illnesses to be placed in appropriate housing situations and linked to mental health services. To comply with requests for client outcome data, State and local providers have sought measures which could help them more effectively monitor and manage their programs as well as demonstrate program effectiveness.

Interest in performance measurement and evaluation of policies, programs and individual services has increased dramatically with the passage of the Government Performance and Results Act (GPRA) in 1993. GPRA focuses new attention on the quality of outcome measures used to collect information about publicly funded programs. Programs that provide services to persons who are homeless and have serious mental illnesses are facing greater need to document their effectiveness. These outcome data will ultimately be used in responding to Congressional and HHS oversight, GPRA requirements, and the requests of other governmental levels, managed care companies, and private funding sources.

The project will test the appropriateness and feasibility of selected indicators to measure the outcome of services to persons who are homeless and have serious mental illnesses. Outcome measures to be evaluated include housing status, sobriety or drug-free status, mental health treatment status, enrollment in an educational program, and employment.

In addition, the project will evaluate process measures pertaining to outreach, service delivery and linkage stages of intervention. These process indicators include the type of contact (*i.e.*, referrals, walk-ins, fixed outreach, and mobile outreach); whether the person contacted agreed to services, reasons for any non-enrollment, and referral to, and provision of, specific services.

The project will test these outcome and process measures in a total of approximately six provider agencies in each of five participating States. The findings of the pilot test will serve as the basis for recommendations for a national implementation of data collection in similar programs. It will also test the feasibility of compiling such data in a central data collection point.

Local providers will report information on services provided to individuals served during an initial 30-day period. Providers will use the Individual Data Collection Form to record information about client characteristics for the time of first contact and during the 30-day period; the Individual Intervention and Linkage Form will be completed to capture information specific to referrals and receipt of services; and the 3-Month Follow-up Form will be completed three months after the end of the initial data collection period to provide more longitudinal information on participant status. No client-identified information will be submitted. After each period of data collection, local providers will be contacted by telephone to obtain feedback on the structure and utility of the data collection instruments, the process of collecting and reporting the data, and the overall burden associated with the data collection and submission effort. Projected response burden for the project is summarized in the table below.

|  | Estimated number of respondents | Responses per respondent | Average burden hours per response | Total annual burden hours |
|--|---------------------------------|--------------------------|-----------------------------------|---------------------------|
| Individual Data Collection Form .....          | 30                              | 20                       | .17                               | 102                       |
| Individual Intervention and Linkage Form ..... | 30                              | 20                       | .17                               | 102                       |
| 3-Month Follow-up Form .....                   | 30                              | 20                       | .06                               | 36                        |
| Provider Survey .....                          | 30                              | 2                        | .50                               | 30                        |
| Total .....                                    | .....                           | .....                    | .....                             | 270                       |

Written comments and recommendations concerning the proposed information collection should be sent by May 17, 2004 to: SAMHSA Desk Officer, Human Resources and

Housing Branch, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503; due to potential delays in OMB's receipt and processing of mail sent

through the U.S. Postal Service, respondents are encouraged to submit comments by fax to: 202-395-6974.

Dated: April 8, 2004.

**Anna Marsh,**

*Executive Officer, SAMHSA.*

[FR Doc. 04-8638 Filed 4-15-04; 8:45 am]

BILLING CODE 4162-20-P

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

[CGD08-04-013]

### Houston/Galveston Navigation Safety Advisory Committee

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of meetings.

**SUMMARY:** The Houston/Galveston Navigation Safety Advisory Committee (HOGANSAC) and its working groups will meet to discuss waterway improvements, aids to navigation, area projects impacting safety on the Houston Ship Channel, and various other navigation safety matters in the Galveston Bay area. All meetings will be open to the public.

**DATES:** The next meeting of HOGANSAC will be held on Thursday, June 3, 2004 at 9 a.m. The meeting of the Committee's working groups will be held on Thursday, May 20, 2004 at 9 a.m. The meetings may adjourn early if all business is finished. Members of the public may present written or oral statements at either meeting. Requests to make oral presentations or distribute written materials should reach the Coast Guard five (5) working days before the meeting at which the presentation will be made. Requests to have written materials distributed to each member of the committee in advance of the meeting should reach the Coast Guard at least ten (10) working days before the meeting at which the presentation will be made.

**ADDRESSES:** The full Committee meeting will be held at the Port of Houston Authority Barbours Cut Cruise Terminal, 820 North L Street, Morgans Point, TX 77572, Pier C-7, (713-670-2400). The working groups meeting will be held at the Port of Texas City, 2425 Hwy 146 N., Texas City, TX 77590 (409-945-4461).

**FOR FURTHER INFORMATION CONTACT:** Captain Richard Kaser, Executive Director of HOGANSAC, telephone (713) 671-5199, Commander Tom Marian, Executive Secretary of HOGANSAC, telephone (713) 671-5164, or Lieutenant Junior Grade Benjamin Morgan, Assistant to the Executive Secretary of HOGANSAC, telephone (713) 671-5103, e-mail

*bmorgan@vtshouston.uscg.mil*. Written materials and requests to make presentations should be sent to Commanding Officer, VTS Houston/Galveston, Attn: LTJG Morgan, 9640 Clinton Drive, Floor 2, Houston, TX 77029.

**SUPPLEMENTARY INFORMATION:** Notice of this meeting is given pursuant to the Federal Advisory Committee Act, 5 U.S.C. App. 2 (Pub. L. 92-463, 86 Stat. 770, as amended).

### Agendas of the Meetings

*Houston/Galveston Navigation Safety Advisory Committee (HOGANSAC).* The tentative agenda includes the following:

(1) Opening remarks by the Committee Sponsor (RADM Duncan) (or the Committee Sponsor's representative), Executive Director (CAPT Kaser) and Chairman (Mr. Tim Leitzell).

(2) Approval of the February 5, 2004 minutes.

(3) Old Business:

(a) Dredging projects.

(b) AtoN Knockdown Working Group.

(c) Mooring subcommittee report.

(d) Education and Outreach subcommittee report.

(e) Area Maritime Security Committee Liaison's report.

(f) Bridge Allision Prevention Working Group.

(g) Electronic Navigation.

(h) Safe Harbor Working Group.

(i) Maritime Incident Review Working Group.

(j) Deepdraft Entry Facilitation Working Group.

(k) Galveston Causeway Construction Working Group.

(4) New Business.

(a) Vessel Refuge and Heavy Weather.

(b) Hurricane Brief.

(c) Status of Shoal Point.

(d) HOGANSAC Membership.

*Working Groups Meeting.* The tentative agenda for the working groups meeting includes the following:

(1) Presentation by each working group of its accomplishments and plans for the future.

(2) Review and discuss the work completed by each working group.

### Procedural

Working groups have been formed to examine the following issues: dredging and related issues, electronic navigation systems, AtoN knockdowns, impact of passing vessels on moored ships, boater education issues, facilitating deep draft movements and mooring infrastructure. Not all working groups will provide a report at this session. Further, working group reports may not necessarily

include discussions on all issues within the particular working group's area of responsibility. All meetings are open to the public. Please note that the meetings may adjourn early if all business is finished. Members of the public may make presentations, oral or written, at either meeting. Requests to make oral or written presentations should reach the Coast Guard five (5) working days before the meeting at which the presentation will be made. If you would like to have written materials distributed to each member of the committee in advance of the meeting, you should send your request along with fifteen (15) copies of the materials to the Coast Guard at least ten (10) working days before the meeting at which the presentation will be made.

### Information on Services for the Handicapped

For information on facilities or services for the handicapped or to request special assistance at the meetings, contact the Executive Director, Executive Secretary, or assistant to the Executive Secretary as soon as possible.

Dated: April 5, 2004.

**R.F. Duncan,**

*Rear Admiral, U.S. Coast Guard, Commander, Eighth Coast Guard District.*

[FR Doc. 04-8709 Filed 4-15-04; 8:45 am]

BILLING CODE 4910-15-P

## DEPARTMENT OF HOMELAND SECURITY

### National Communications System

### National Security Telecommunications Advisory Committee

**AGENCY:** National Communications System (NCS).

**ACTION:** Notice of closed meeting.

**SUMMARY:** The 27th meeting of the President's National Security Telecommunications Advisory Committee (NSTAC) will be held on Tuesday, May 18 and Wednesday, May 19, 2004, from 9 a.m. to 4 p.m. The NSTAC is subject to the Federal Advisory Committee Act (FACA), Pub. L. 92-463, as amended (5 U.S.C. App. II.) The meeting will be closed to the public to allow for discussion of:

- Cyber-Related Vulnerabilities of the Internet.

Since discussion regarding industry member's cyber-related vulnerabilities of the Internet could reveal company proprietary information, it is necessary to close this meeting. Closing this

meeting is consistent with 5 U.S.C. 552b(c)(4).

**FOR FURTHER INFORMATION CONTACT:** Call Ms. Kiesha Gebreyes, (703) 607-6134, or write the Manager, National Communications System, 701 South Court House Road, Arlington, Virginia 22204-2198.

**Peter M. Fonash,**

*Federal Register Certifying Officer, National Communications System.*

[FR Doc. 04-8700 Filed 4-15-04; 8:45 am]

**BILLING CODE 4410-10-M**

## DEPARTMENT OF HOMELAND SECURITY

### National Communications System

#### Telecommunications Service Priority System Oversight Committee

**AGENCY:** National Communications System (NCS), DHS.

**ACTION:** Notice of meeting.

A meeting of the Telecommunications Service Priority (TSP) System Oversight Committee will convene Wednesday, May 5, 2004, from 9 a.m. to 12 p.m. The meeting will be held at 701 South Courthouse Road, Arlington, VA in the NCS conference room on the 2nd floor.

- TSP Program Update;
- TSP Revalidation Update;
- PSWG Update.

Anyone interested in attending or presenting additional information to the Committee, please contact Deborah Bea, Office of Priority Telecommunications, (703) 607-4933. Media or Press must contact Mr. Steve Barrett at (703) 607-6211.

**Peter M. Fonash,**

*Certifying Officer.*

[FR Doc. 04-8622 Filed 4-15-04; 8:45 am]

**BILLING CODE 4410-10-M**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-4901-N-16]

### Federal Property Suitable as Facilities To Assist the Homeless

**AGENCY:** Office of the Assistant Secretary for Community Planning and Development, HUD.

**ACTION:** Notice.

**SUMMARY:** This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

**EFFECTIVE DATE:** April 16, 2004.

### FOR FURTHER INFORMATION CONTACT:

Kathy Burruss, Department of Housing and Urban Development, Room 7262, 451 Seventh Street, SW., Washington, DC 20410; telephone (202) 708-1234; TTY number for the hearing- and speech-impaired (202) 708-2565, (these telephone numbers are not toll-free), or call the toll-free Title V information line at 1-800-927-7588.

**SUPPLEMENTARY INFORMATION:** In accordance with the December 12, 1988 court order in *National Coalition for the Homeless v. Veterans Administration*, No. 88-2503-OG (D.D.C.), HUD publishes a Notice, on a weekly basis, identifying unutilized, underutilized, excess and surplus Federal buildings and real property that HUD has reviewed for suitability for use to assist the homeless.

Today's Notice is for the purpose of announcing that no additional properties have been determined suitable or unsuitable this week.

Dated: April 8, 2004.

**Mark R. Johnson,**

*Acting Director, Office of Special Needs Assistance Programs.*

[FR Doc. 04-8339 Filed 4-15-04; 8:45 am]

**BILLING CODE 4210-29-M**

## DEPARTMENT OF THE INTERIOR

### Office of the Secretary

[GWCRC Meeting Notice No. 3-04]

### Guam War Claims Review Commission

The Guam War Claims Review Commission, pursuant to section 10 of the Federal Advisory Committee Act (5 U.S.C. App. 10), hereby gives notice in regard to the scheduling of meetings for the transaction of Commission business, as follows:

**DATE AND TIME:** Monday, April 26, 2004, 10 a.m.; Tuesday, April 27, 2004, 10 a.m.

**PLACE:** 600 E St., NW., Room 6002, Washington, DC.

**SUBJECT MATTER:** Discussion of the report which the Commission is required to submit to the Secretary of the Interior and Congressional committees under the Guam War Claims Review Commission Act, Public Law 107-333.

**STATUS:** Open.

Requests for information concerning these meetings should be addressed to David Bradley, Executive Director, Guam War Claims Review Commission, c/o Foreign Claims Settlement Commission of the United States, 600 E St., NW., Washington DC 20579,

telephone (202) 616-6975, fax (202) 616-6993.

**Mauricio J. Tamargo,**

*Chairman.*

[FR Doc. 04-8609 Filed 4-15-04; 8:45 am]

**BILLING CODE 4310-93-P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Indian Affairs

#### Notice of Proposed Information Collection Requests

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Notice.

**SUMMARY:** This notice announces that the Information Collection Requests for the Bureau of Indian Affairs Higher Education Grant Program Annual Report Form, OMB Control No. 1076-0106, and the Bureau of Indian Affairs Higher Education Grant Program Application, OMB Control No. 1076-0101 are being renewed. The proposed information collection requirements, with no appreciable changes, described below will be submitted to the Office of Management and Budget (OMB) for review as required by the Paperwork Reduction Act of 1995 after the public has an opportunity to comment on these proposals.

**DATES:** Submit your comments and suggestions on or before June 15, 2004.

**ADDRESSES:** Written comments should be sent directly to Garry R. Martin, Bureau of Indian Affairs, Office of Indian Education Programs, 1849 C Street, NW., Washington, DC 20240-0001, or hand delivered to Room 3526-MIB at the above address.

**FOR FURTHER INFORMATION CONTACT:** Copies of the information collection may be obtained by contacting Garry R. Martin, 202-208-3478. Comments can be reviewed at the location listed in the **ADDRESSES** section between the hours of 8 a.m. to 4:30 p.m. Monday through Friday.

### SUPPLEMENTARY INFORMATION:

#### Abstract

The information collection is necessary to request applications for this program and to assess the need for this program as required by 25 CFR 40.

#### Request for Comments

The Office of Indian Education Programs requests your comments on this collection concerning:

(a) Whether these information collections are necessary for the proper performance of the functions of the

agency, including whether the information will have practical utility;

(b) The accuracy of the agency's estimate of the burden (hours and cost) of the collection of information, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility and clarity of the information to be collected; and

(d) Ways to minimize the burden of the collection of the information on the respondents, including through the use of automated collection techniques or other forms of information technology.

Please note that an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Each proposed information collection contains the following: Type of Review requested, *e.g.*, new, revision, extension, reinstatement, existing; Title; Summary of collection; Description of the need for, and proposed use of, the information; respondents and frequency of collection; Reporting and/or Record keeping burden.

#### Information Collection Abstract

*Type of Review:* Renewal.

*Title:* Higher Education Grant Program Annual Report Form.

*OMB approval number:* 1076-0106.

*Need and use of the Information:* This is a compilation of data from tribes or tribal organizations that participate in the Bureau of Indian Affairs Higher Education Grant Program. The information is used to account for the funds appropriated for this program.

*Frequency:* Annually.

*Description of respondents:* Tribes, Tribal Organizations.

*Estimated completion time:* 3 hours.

*Number of Annual responses:* 125.

*Annual Burden hours:* 375 hours.

#### Information Collection Abstract

*Type of Review:* renewal.

*Title:* Higher Education Grant Program Application.

*OMB approval number:* 1076-0101.

*Need and use of the information:* The information is used by the tribe or tribal organization to determine the eligibility of the respondents for this program.

*Frequency:* Annually.

*Description of respondents:* Eligible American Indian and Alaska Native students.

*Estimated completion time:* 1 hour.

*Number of Annual responses:* 14,000.

*Annual Burden hours:* 14,000 total hours.

Dated: April 8, 2004.

**David W. Anderson,**

*Assistant Secretary—Indian Affairs.*

[FR Doc. 04-8707 Filed 4-15-04; 8:45 am]

**BILLING CODE 4310-6W-P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Indian Affairs

#### Proposed Collection of Information

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Notice.

**SUMMARY:** This notice announces that the Office of Indian Education Programs is seeking comments on the renewal of the Information Collection Request for the Tribal Colleges and Universities Annual Report Form, OMB Control No. 1076-0105, as required by the Paperwork Reduction Act of 1995. The Office of Indian Education Programs also seeks comments on proposed changes to the form.

**DATES:** Submit comments on or before June 15, 2004.

**ADDRESSES:** Written comments should be sent directly to Edward Parisian, Bureau of Indian Affairs, Office of Indian Education Programs, 1849 C Street, NW., Washington, DC 20240-0001. You may also send comments via facsimile to 202-208-3271.

**FOR FURTHER INFORMATION CONTACT:** You may request further information or obtain copies of the proposed information collection request from Garry R. Martin, 202-208-3478.

**SUPPLEMENTARY INFORMATION:** Each tribal college and university receiving financial assistance under the Tribally Controlled College or University Assistance Act of 1978 (Act) is required by the Act, and by 25 Code of Federal Regulations part 41, to provide an accounting of amounts and purposes for which financial assistance was expended for the preceding academic year. The information collection is also needed to assess use of Federal funds as required by the Government Performance and Results Act (GPRA) of 1993. The information collection form is being changed to respond to GPRA requirements. Even though there are additional information collection requirements as a result of GPRA, the time required to complete the form will not increase because other portions of the form have been streamlined.

#### Request for Comments

The Office of Indian Education Programs requests your comments on this collection concerning:

(a) The necessity of this information collection for the proper performance of the functions of the agency, including whether the information will have practical utility;

(b) The accuracy of the agency's estimate of the burden (hours and cost) of the collection of information, including the validity of the methodology and assumptions used;

(c) Ways we could enhance the quality, utility and clarity of the information to be collected; and

(d) Ways we could minimize the burden of the collection of the information on the respondents, such as through the use of automated collection techniques or other forms of information technology.

Please note that an agency may not sponsor or request, and an individual need not respond to, a collection of information unless it has a valid OMB Control Number.

It is our policy to make all comments available to the public for review at the location listed in the **ADDRESSES** section, room 3512, during the hours of 8 a.m. to 4:30 p.m., *e.s.t.*, Monday through Friday except for legal holidays. If you wish to have your name and/or address withheld, you must state this prominently at the beginning of your comments. We will honor your request according to the requirements of the law. All comments from organizations or representatives will be available for review. We may withhold comments from review for other reasons.

#### Information Collection Abstract

*OMB Control Number:* 1076-0105.

*Type of review:* Renewal.

*Title:* Tribal Colleges and Universities Annual Report Form.

*Brief description of collection:* The respondent must provide the information under Pub. L. 95-471 to receive and maintain grant funds. The respondent must also provide the information under GPRA.

*Respondents:* Tribal College and University administrators.

*Number of respondents:* 26.

*Estimated time per response:* 3 hours.

*Frequency of response:* Annually.

*Total annual burden to respondents:* 78 hours.

Dated: April 8, 2004.

**David W. Anderson,**

*Assistant Secretary—Indian Affairs.*

[FR Doc. 04-8708 Filed 4-15-04; 8:45 am]

**BILLING CODE 4310-6W-P**

**DEPARTMENT OF THE INTERIOR****Bureau of Land Management****Fair Market Value Meeting for the Summit Creek Coal Tract, Carbon County, Utah**

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of public meeting and call for public comment on the proposed sale and fair market value and maximum economic recovery consideration for Coal Lease Application UTU-79975.

**SUMMARY:** The Bureau of Land Management (BLM) will hold a public meeting on April 22, 2004, for the proposed competitive sale, of the Summit Creek Coal Tract. BLM requests public comment on the fair market value and environmental effects of this tract. The BLM signed a Finding of No Significant Impact/Decision Record dated April 9, 2004 that discusses the environmental effects of mining this tract. The lands included in the delineated Federal coal lease tract are located in Carbon County, Utah approximately 5 miles north of Price, Utah on public lands under the jurisdiction of the BLM Price Field Office and are described as follows:

**SLM, Carbon County, Utah**

T. 12 S., R. 11 E.,  
Section 29, SWSW, SWSE;  
Section 30, Lots 4, 12, 14-16;  
Section 31, Lots 1, 2, 7-11;  
Section 32, W2NE, E2NW, NWNW, NESW.

Approximately 702.73 acres more or less.

Andalex Resources submitted the application for the coal lease. The company plans to mine the coal as an extension from their existing Aberdeen mine if the lease is obtained. The Summit Creek coal tract is minable in the Aberdeen coal bed. The minable portions of the coal beds in this area are from 6 to 10 feet in thickness. The tract contains more than 5 million tons of recoverable high-volatile C bituminous coal. The coal quality in the seams on an "as received basis" is as follows: 12,756 Btu/lb., 5.95 percent moisture, 4.63 percent ash, 44.73 percent volatile matter, 45.69 percent fixed carbon and 0.44 percent sulfur. The public is invited to the meeting to make public and/or written comments on the environmental implications of leasing the proposed tract, and also to submit comments on the Fair Market Value and the Maximum Economic Recovery of the tract.

**SUPPLEMENTARY INFORMATION:** In accordance with Federal coal

management regulations 43 CFR 3422 and 3425, the public meeting is being held on the proposed sale to allow public comment on and discussion of the potential effects of mining and proposed lease. The meeting is being advertised in the Sun Advocate located in Price, Utah and the Emery County Progress located in Emery, Utah. 43 CFR 3422 states that, No less than 30 days prior to the publication of the notice of sale, the Secretary shall solicit public comments on the Fair Market Value appraisal and Maximum Economic Recovery and on factors that may affect these two determinations. Proprietary data marked as confidential may be submitted to the Bureau of Land Management in response to this solicitation of public comments. Data so marked shall be treated in accordance with the laws and regulations governing the confidentiality of such information. A copy of the comments submitted by the public on fair market value and maximum economic recovery, except those portions identified as proprietary by the author and meeting exemptions stated in the Freedom of Information Act, will be available for public inspection at the Bureau of Land Management, Utah State Office during regular business hours (8 a.m.-4 p.m.) Monday through Friday. Comments on the Fair Market Value and Maximum Economic Recovery should be sent to the Bureau of Land Management and should address, but not necessarily be limited to, the following information.

1. The quality and quantity of the coal resource;

2. The mining methods or methods which would achieve maximum economic recovery of the coal, including specifications of seams to be mined and the most desirable timing and rate of production;

3. Whether this tract is likely to be mined as part of an existing mine and therefore should be evaluated on a realistic incremental basis, in relation to the existing mine to which it has the greatest value;

4. Whether the tract should be evaluated as part of a potential larger mining unit and evaluated as a portion of a new potential mine (*i.e.*, a tract which does not in itself form a logical mining unit);

5. Restrictions to mining that may affect coal recovery;

6. The price that the mined coal would bring when sold;

7. Costs, including mining and reclamation, of producing the coal and the time of production.

8. The percentage rate at which anticipated income streams should be discounted, either with inflation or in

the absence of inflation, in which case the anticipated rate of inflation should be given;

9. Depreciation, depletion, amortization and other tax accounting factors;

10. The value of any surface estate where held privately;

11. Documented information on the terms and conditions of recent and similar coal land transactions in the lease sale area;

12. Any comparable sales data of similar coal lands; and coal quantities and the Fair Market Value of the coal developed by BLM may or may not change as a result of comments received from the public and changes in the market conditions between now and when final economic evaluations are completed.

**DATES:** The public meeting is being held on Thursday, April 22, 2004 at the BLM Price Field Office, 125 So. 600 W, Price, Utah, starting at 7 p.m.

**FOR FURTHER INFORMATION CONTACT:** Written comments on the Fair Market Value and Maximum Economic Recovery must be received by May 14, 2003 and should be addressed to Mr. Jeff McKenzie, 801-539-4038, Bureau of Land Management, Utah State Office, Division of Lands and Minerals, P.O. Box 45155, Salt Lake City, Utah 84145-0155. Information on the Finding of No Significant Impact/Decision Record can be obtained by contacting Mr. Jeff McKenzie, 801-539-4038, or Mr. Steve Falk, 435-636-3605 at the BLM Price Field Office. The appeal periods for the Finding of No Significant Impact/Decision Record document and the appeal period for BLM's decision to lease will end on May 9, 2004. Any appeals must be postmarked as of these dates.

**Douglas P. Bauer,**

*Acting Deputy State Director, Division of Lands and Minerals.*

[FR Doc. 04-8545 Filed 4-15-04; 8:45 am]

**BILLING CODE 4310-SS-P**

**DEPARTMENT OF THE INTERIOR****Bureau of Land Management**

[MT-926-04-1420-BJ]

**Montana: Filing of Plat of Survey**

**AGENCY:** Bureau of Land Management, Montana State Office, Interior.

**ACTION:** Notice of filing of plat of survey.

**SUMMARY:** The Bureau of Land Management (BLM) will file the plat of survey of the lands described below in the BLM Montana State Office, Billings,

Montana, (30) days from the date of publication in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:**

Steve Toth, Cadastral Surveyor, Branch of Cadastral Survey, Bureau of Land Management, 5001 Southgate Drive, P.O. Box 36800, Billings, Montana 59107-6800, telephone (406) 896-5121 or (406) 896-5009.

**SUPPLEMENTARY INFORMATION:** This survey was executed at the request of the U.S. Forest Service and was necessary to delineate Forest Service lands. The lands we surveyed are:

**Principal Meridian, Montana**

T. 6 S., R. 2 E.

The plat, in three sheets, representing the dependent resurvey of portions of the east boundary and subdivisional lines, the subdivision of section 26 and the survey of a portion of the Lee Metcalf Wilderness Boundary, Township 6 South, Range 2 East, Principal Meridian, Montana, was accepted April 9, 2004.

We will place copy of the plat, in 3 sheets, in the open files. They will be available to the public as a matter of information.

If BLM receives a protest against this survey, as shown on this plat, in three sheets, prior to the date of the official filing, we will stay the filing pending our consideration of the protest.

We will not officially file this plat, in three sheets, until the day after we have accepted or dismissed all protests and they have become final, including decisions or appeals.

Dated: April 9, 2004.

**Thomas M. Deiling,**

*Chief Cadastral Surveyor, Division of Resources.*

[FR Doc. 04-8641 Filed 4-15-04; 8:45 am]

**BILLING CODE 4310--SS-P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Reclamation

#### Operational Changes in Support of Lake Cascade Fishery Restoration, Boise Project, Payette Division, ID

**AGENCY:** Bureau of Reclamation, Interior.

**ACTION:** Notice of cancellation.

**SUMMARY:** The Bureau of Reclamation (Reclamation) is canceling work on the environmental impact statement (EIS) for proposed operational changes at Lake Cascade, on the North Fork Payette River near Cascade, Idaho. Because of a potential for irrigation shortages, and a high probability of a reduction in salmon flow augmentation water as a

result of the proposal, both Reclamation and Idaho Department of Fish and Game (IDFG) decided that the draining of Lake Cascade is not a viable option for sport fish restoration. The notice of intent was published in the **Federal Register** (68 FR 41842, July 15, 2003).

**FOR FURTHER INFORMATION CONTACT:** Mr. Steve Dunn, Snake River Area Office at telephone 208-334-9844, or e-mail [sdunn@pn.usbr.gov](mailto:sdunn@pn.usbr.gov). TTY users may call 208-334-9844 by dialing 711 to obtain a toll free TTY relay.

**SUPPLEMENTARY INFORMATION:** In early 2003, IDFG requested that Reclamation consider draining Lake Cascade to assist in a fishery restoration project to help rebuild the Lake Cascade sport fishery. IDFG had determined that the presence of large numbers of northern pikeminnow and largescale suckers in the lake were a major cause of the decline of the important yellow perch and trout fishery and would prevent recovery of the fishery unless their number were significantly reduced. IDFG had analyzed different methods to remove and/or reduce the numbers of northern pikeminnow and largescale suckers. They concluded the most economical method, with the highest probability for success, would entail lowering the reservoir's water level as much as possible and utilizing a fish toxicant (rotenone) to kill any remaining fish. The reservoir would then be restocked with yellow perch, trout and other gamefish.

Preliminary analysis of the draining proposal identified the potential for significant environmental and socioeconomic effects, and Reclamation concluded that an EIS, because draining the lake would be considered a Federal action, would need to be prepared to comply with the National Environmental Policy Act of 1969. In July 2003, Reclamation published a Notice of Intent to prepare an EIS in the **Federal Register** and to conduct public scoping meetings. Scoping meetings were held in southwest Idaho in early August 2003, and written comments were accepted into September. Over 340 distinct comments were received and reviewed.

The first analysis needed for the proposal was a complete understanding of the physical and logistical aspects of draining Lake Cascade and the reservoir's subsequent refill. Information was needed on how the project would affect irrigation deliveries, salmon flow augmentation supplies, the reservoir conservation pool, river flows and other uses of the Payette River drainage. Reclamation water operations experts conducted

reservoir drawdown and refill studies in the fall of 2003 and recently presented their findings. Major findings of the water studies concluded that the reservoir could be drained to accommodate the fishery renovation proposed by IDFG, but with varying impacts to irrigation deliveries and salmon flow augmentation, depending on hydrologic conditions in the months and years following the drawdown.

The water studies indicated that under one of the drawdown scenarios studied, irrigation deliveries would have little chance of being impaired. Another drawdown scenario identified possible irrigation impacts in the first irrigation season following the drawdown if it was a very dry year, and possibly for more than one year in successive dry years.

However, salmon flow augmentation supplies were likely to be affected by all of the drawdown scenarios analyzed. Impacts would occur in the first augmentation season following the drawdown and potentially for several years afterward. Reclamation has committed to provide up to 427,000 acre-feet of flows, as a result of consultation under the Endangered Species Act, to aid in juvenile salmon migration in the Snake and Columbia Rivers. The Payette River annually supplies approximately one-third of the salmon flow augmentation from Idaho and provides irrigation water to more than 100,000 acres of farmland.

Dated: March 1, 2004.

**J. William McDonald,**

*Regional Director, Pacific Northwest Region.*

[FR Doc. 04-8627 Filed 4-15-04; 8:45 am]

**BILLING CODE 4310-MN-P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Reclamation

#### California Bay-Delta Public Advisory Committee Public Meeting

**AGENCY:** Bureau of Reclamation, Interior.

**ACTION:** Notice of meeting.

**SUMMARY:** In accordance with the Federal Advisory Committee Act, the California Bay-Delta Public Advisory Committee will meet on May 13, 2004. The agenda for the meeting will include consideration of subcommittee recommendations and discussion of the CALFED Science Program, the Finance Options Report, the Draft Program Plans, the Delta Improvements Package, and implementation of the CALFED Bay-Delta Program with State and Federal agency representatives.

**DATES:** The meeting will be held Thursday, May 13, 2004, from 9 a.m. to 5 p.m. If reasonable accommodation is needed due to a disability, please contact Pauline Nevins at (916) 445-5511 or TDD (800) 735-2929 at least 1 week prior to the meeting.

**ADDRESSES:** The meeting will be held at the California Bay-Delta Authority offices at 650 Capitol Mall 5th Floor, Bay-Delta Room, Sacramento, California.

**FOR FURTHER INFORMATION CONTACT:** Heidi Rooks, California Bay-Delta Authority, at (916) 445-5511, or Diane Buzzard, U.S. Bureau of Reclamation, at (916) 978-5022.

**SUPPLEMENTARY INFORMATION:** The Committee was established to provide recommendations to the Secretary of the Interior, other participating Federal agencies, the Governor of the State of California, and the California Bay-Delta Authority on implementation of the CALFED Bay-Delta Program. The Committee makes recommendations on annual priorities, integration of the eleven Program elements, and overall balancing of the four Program objectives of ecosystem restoration, water quality, levee system integrity, and water supply reliability. The Program is a consortium of State and Federal agencies with the mission to develop and implement a long-term comprehensive plan that will restore ecological health and improve water management for beneficial uses of the San Francisco/Sacramento and San Joaquin Bay Delta.

Committee and meeting materials will be available on the California Bay-Delta Authority Web site at <http://calwater.ca.gov> and at the meeting. This meeting is open to the public. Oral comments will be accepted from members of the public at the meeting and will be limited to 3-5 minutes.

(Authority: The Committee was established pursuant to the Department of the Interior's authority to implement the Fish and Wildlife Coordination Act, 16 U.S.C. 661 *et seq.*, the Endangered Species Act, 16 U.S.C. 1531 *et seq.*, and the Reclamation Act of 1902, 43 U.S.C. 371 *et seq.*, and the acts amendatory thereof or supplementary thereto, all collectively referred to as the Federal Reclamation laws, and in particular, the Central Valley Project Improvement Act, Pub. L. 102-575.)

Dated: April 1, 2004.

**Allan Oto,**  
Special Projects Officer, Mid-Pacific Region.  
[FR Doc. 04-8644 Filed 4-15-04; 8:45 am]

**BILLING CODE 4310-MN-M**

## DEPARTMENT OF THE INTERIOR

### Bureau of Reclamation

#### Glen Canyon Dam Adaptive Management Work Group (AMWG), Notice of Meeting

**AGENCY:** Bureau of Reclamation, Interior.

**ACTION:** Notice of public meeting.

**SUMMARY:** The Adaptive Management Program (AMP) was implemented as a result of the Record of Decision on the Operation of Glen Canyon Dam Final Environmental Impact Statement to comply with consultation requirements of the Grand Canyon Protection Act (Pub. L. 102-575) of 1992. The AMP provides an organization and process to ensure the use of scientific information in decisionmaking concerning Glen Canyon Dam operations and protection of the affected resources consistent with the Grand Canyon Protection Act. The AMP has been organized and includes a Federal advisory committee (AMWG), a technical work group (TWG), a monitoring and research center, and independent review panels. The TWG is a subcommittee of the AMWG and provides technical advice and information for the AMWG to act upon.

**Date and Location:** The TWG will conduct the following public meeting:

*Phoenix, Arizona—May 3 and 4, 2004.* The meeting will begin at 9:30 a.m. and conclude at 5 p.m. on the first day and will begin at 8 a.m. and conclude at noon on the second day. The meeting will be held at the Bureau of Indian Affairs—Western Regional Office, 2 Arizona Center, 400 N. 5th Street, Conference Room A (12th Floor), Phoenix, Arizona.

**Agenda:** The purpose of the meeting will be to begin development of the long-term experimental plan, and discuss the TWG Operating Procedures, ad hoc group updates, environmental compliance, and other administrative and resource issues pertaining to the AMP.

To allow full consideration of information by the TWG members, written notice must be provided to Dennis Kubly, Bureau of Reclamation, Upper Colorado Regional Office, 125 South State Street, Room 6107, Salt Lake City, Utah 84138; telephone (801) 524-3715; faxogram (801) 524-3858; e-mail at [dkubly@uc.usbr.gov](mailto:dkubly@uc.usbr.gov) (5) days prior to the meeting. Any written comments received will be provided to the AMWG and TWG members prior to the meeting.

**FOR FURTHER INFORMATION CONTACT:** Dennis Kubly, telephone (801) 524-

3715; faxogram (801) 524-3858; or via e-mail at [dkubly@uc.usbr.gov](mailto:dkubly@uc.usbr.gov).

Dated: April 6, 2004.

**Dennis Kubly,**

Chief, Adaptive Management Group,  
Environmental Resources Division, Upper  
Colorado Regional Office.

[FR Doc. 04-8636 Filed 4-15-04; 8:45 am]

**BILLING CODE 4310-MN-P**

## DEPARTMENT OF JUSTICE

### Notice of Lodging of Consent Decree Pursuant to the Clean Water Act and the Resource Conservation and Recovery Act

Notice is hereby given that on March 24, 2004, a proposed consent Decree in *United States v. Caribbean Petroleum Refining, L.P.*, Civil Action No. 99-1171 (SEC), was lodged with the United States District Court for the District of Puerto Rico.

The proposed Consent Decree resolves the United States' claims on behalf of the U.S. Environmental Protection Agency ("EPA") for injunctive relief under the Clean Water Act and the Resource Conservation and Recovery Act ("RCRA"), subtitles C and I, against Caribbean Petroleum Refining, L.P. ("CPR"). Pursuant to the Consent Decree, CPR is required to comply with all terms and provisions, including the effluent limitations, of its NPDES Permit, comply with all CFR part 265, subparts G, H and K post closure care requirements for its Equalization Basin, including conducting groundwater monitoring or remediation pursuant to any EPA-approved groundwater plan, and comply with applicable requirements of Subtitle I of RCRA relating to underground storage tanks, including the federally enforceable Puerto Rico regulations provided at 40 CFR 282.102, that are applicable to all underground storage tanks located at the CPR Facility. In a prior, now final, settlement stipulation entered in CPR's bankruptcy proceeding, CPR agreed to pay a civil penalty of \$1.3 million over six years.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General of the Environment and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to *United States v. Caribbean Petroleum Refining, L.P.*, Civil Action No. 99-1171 (SEC), D.J. Ref. 90-5-1-1-4058.

The proposed Consent Decree may be examined at the Office of the United

States Attorney, District of Puerto Rico, Federal Office Building, Rm. 101, Carlos E. Chardon Avenue, Hato Rey, Puerto Rico 00918, and at the United States Environmental Protection Agency, Region II, 290 Broadway, New York, New York 10007-1866. During the public comment period, the proposed Consent Decree may also be examined on the following Department of Justice Web site, <http://www.usdoj.gov/enrd/open.html>. A copy of the proposed Consent Decree may be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044-7611 or by faxing or e-mailing a request to Tonia Fleetwood ([tonia.fleetwood@usdoj.gov](mailto:tonia.fleetwood@usdoj.gov)), fax no. (202) 514-0097, phone confirmation number (202) 514-1547. If requesting a copy of the proposed Consent Decree, please so note and enclose a check in the amount of \$6.00 (25 cent per page reproduction cost) payable to the U.S. Treasury.

**Ronald Gluck,**

*Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. 04-8665 Filed 4-15-04; 8:45 am]

BILLING CODE 4410-15-M

## DEPARTMENT OF JUSTICE

### Notice of Lodging of Settlement Agreement Under the Comprehensive Environmental Response, Compensation and Liability Act, the Emergency Planning and Community Right-To-Know Act, and Chapter 11 of the United States Bankruptcy Code

Notice is hereby given that on April 12, 2004, a proposed Settlement Agreement ("Agreement") in *In re GenTek, Inc.*, Case No. 02-12968, was lodged with the United States Bankruptcy Court for the District of Delaware. The Agreement is between GenTek, Inc. and its affiliated debtors and debtors-in-possession (collectively, the "Debtors") and the United States, on behalf of the United States Environmental Protection Agency ("EPA"), the United States Department of the Interior, and the National Oceanic and Atmospheric Administration of the United States Department of Commerce. The Agreement relates to liabilities of the Debtors under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. 9610 *et seq.* ("CERCLA") and the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. 11001 *et seq.* ("EPCRA"). The Agreement provides as follows:

1. The United States, on behalf of EPA, would receive (a) an allowed general unsecured claim in the amount of \$352,437 for unreimbursed response costs incurred through June 27, 2003 in connection with the Allied Chemical Corporation Works Site located in Front Royal, Virginia (Debtor General Chemical Corporation is a potentially responsible party at this site), and (b) and allowed claim in the amount of \$36,000 with respect to violations by Debtor General Chemical Corporation of the notice requirements of Section 304 of EPCRA, 42 U.S.C. 11004, with respect to the release of sulfur trioxide on or about January 19, 2000 at the Delaware Valley Works in Claymont, Delaware.

2. The Debtors have agreed to comply with the following Unilateral Administrative Orders ("UAOs"), as amended, issued to Debtor General Chemical Corporation: (a) September 30, 1998 UAO issued by Region 3 of EPA requiring the implementation of a removal action at the Allied Chemical Corporation Works Site located in Front Royal, Virginia, and (b) the August 30, 2000 UAO issued by Region 3 of EPA under the Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.*, with respect to the Delaware Valley Works in Claymont, Delaware.

3. For Debtor-Owned sites, there shall be no discharge under Section 1141 of the Bankruptcy Code with respect to, *inter alia*, actions against Debtors by the United States under CERCLA or RCRA seeking to compel the performance of a removal action, remedial action, or corrective action.

4. For all other sites including, without limitation, the Kim-Stan Site in Alleghany County, Virginia and the Allied Chemical Corporation Works Site located in Front Royal, Virginia (except for the response costs paid at the site through June 27, 2003 and the obligations of General Chemical Corporation under the September 20, 1998 UAO), the United States may not issue or seek environmental cleanup orders based on the Debtors' conduct before the bankruptcy action, but may recover response costs and natural resource damages based on such conduct, in an amount that is approximately equivalent to the amount the United States would have received if the United States' claims had been allowed unsecured claims under the Debtors' reorganization plan.

For a period of 15 days from the date of this publication, the Department of Justice will receive comments relating to the Agreement. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S.

Department of Justice, Washington, DC 20044, and should refer to *In re GenTek, Inc.*, Case No. 02-12968 (Bankr. D. Del.), D.J. Ref. No. 90-7-1-23/4. A copy of the comments should be sent to Donald G. Frankel, Department of Justice, Environmental Enforcement Section, One Gateway Center, Suite 616, Newton, MA 02458.

The Agreement may be examined at the Office of the United States Attorney, district of Delaware, 1201 Market Street, Suite 1100, P.O. Box 2046, Wilmington, Delaware 19899-2046 (contact Ellen Slights at 302-573-6277). During the public comment period, the Agreement may also be examined on the following Department of Justice website, <http://www.usdoj.gov/enrd/open.html>. A copy of the Agreement may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044, or by faxing or e-mailing a request to Tonia Fleetwood ([tonia.fleetwood@usdoj.gov](mailto:tonia.fleetwood@usdoj.gov)), fax number (202) 514-0097, phone confirmation number (202) 514-1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of \$5.00 (25 cents per page reproduction cost) payable to the United States Treasury.

**Robert Brook,**

*Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. 04-8664 Filed 4-15-04; 8:45 am]

BILLING CODE 4410-15-M

## DEPARTMENT OF JUSTICE

### Federal Bureau of Investigation

#### Meeting of the Compact Council for the National Crime Prevention and Privacy Compact

**AGENCY:** Federal Bureau of Investigation.

**ACTION:** Meeting notice.

**SUMMARY:** The purpose of this notice is to announce a meeting of the Compact Council created by the National Crime Prevention and Privacy Compact Act of 1998 (Compact). Thus far, the federal government and 21 states are parties to the Compact which governs the exchange of criminal history records for licensing, employment, and similar purposes. The Compact also provides a legal framework for the establishment of a cooperative federal-state system to exchange such records.

The United States Attorney General appointed 15 persons from federal and state agencies to serve on the Compact Council. The Council will prescribe

system rules and procedures for the effective and proper operation of the Interstate Identification Index system.

Matters for discussion are expected to include:

- (1) Draft of Noncriminal Justice Outsourcing Rule and Security and Management Outsourcing Standard;
- (2) Draft of National Fingerprint File Rule; and
- (3) Report on the National Fingerprint-Based Applicant Check Study.

The meeting will be open to the public on a first-come, first-seated basis. Any member of the public wishing to file a written statement with the Compact Council or wishing to address this session of the Compact Council should notify Mr. Todd C. Commadore at (304) 625-2803, at least 24 hours prior to the start of the session. The notification should contain the requestor's name and corporate designation, consumer affiliation, or government designation, along with a short statement describing the topic to be addressed, and the time needed for the presentation. Requestors will ordinarily be allowed up to 15 minutes to present a topic.

**DATES AND TIMES:** The Compact Council will meet in open session from 9 a.m. until 5 p.m., on May 18-19, 2004.

**ADDRESSES:** The meeting will take place at the Sheraton Minneapolis West, 12201 Ridgedale Drive, Minnetonka, Minnesota, telephone (952) 593-0000.

**FOR FURTHER INFORMATION CONTACT:** Inquiries may be addressed to Mr. Todd C. Commadore, FBI Compact Officer, Compact Council Office, Module C3, 1000 Custer Hollow Road, Clarksburg, West Virginia 26306-0148, telephone (304) 625-2803, facsimile (304) 625-5388.

Dated: April 5, 2004.

**Monte C. Strait,**

*Section Chief, Programs Development  
Section, Criminal Justice Information Services  
Division, Federal Bureau of Investigation.*

[FR Doc. 04-8626 Filed 4-15-04; 8:45 am]

**BILLING CODE 4410-02-M**

## DEPARTMENT OF LABOR

### Employment and Training Administration

[TA-W-53,918]

#### **BMC Software, Inc., Houston, TX; Notice of Negative Determination Regarding Application for Reconsideration**

By application of February 9, 2004, a petitioner requested administrative

reconsideration of the Department's negative determination regarding eligibility for workers and former workers of the subject firm to apply for Trade Adjustment Assistance (TAA). The denial notice applicable to workers of BMC Software, Inc., Houston, Texas was signed on January 20, 2004, and published in the **Federal Register** on March 12, 2004 (69 FR 11888).

Pursuant to 29 CFR 90.18(c) reconsideration may be granted under the following circumstances:

- (1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;
- (2) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or
- (3) If in the opinion of the Certifying Officer, a misinterpretation of facts or of the law justified reconsideration of the decision.

The TAA petition was filed on behalf of workers at BMC Software, Inc., Houston, Texas engaged in design and development of software. The petition was denied because the petitioning workers did not produce an article within the meaning of section 222 of the Act.

The petitioner contends that the Department erred in its interpretation of work performed at the subject facility as a service. As proof, the petitioner submitted three URL locations of the BMC Web site which contain references to BMC products and product lines. The petitioner emphasizes that because the Web site uses the word "product" in regards to BMC software, the Department should consider workers of BMC Software, Inc. as production workers.

A company official was contacted for clarification in regard to the nature of the work performed at the subject facility. The official stated that workers of BMC Software, Inc., Houston, Texas are software developers. The official further clarified that software developed at the subject firm is not mass-produced on media devices and is not sold off-the-shelf. The developers mostly customize software for individual users and provide services to support the software. The company official further stated that due to significant restructuring actions to reduce ongoing operational expenses, BMC Software, Inc. implemented large reduction of worldwide workforce, which included some of the workers of the subject firm.

The sophistication of the work involved is not an issue in ascertaining whether the petitioning workers are eligible for trade adjustment assistance,

but rather only whether they produced an article within the meaning of section 222 of the Trade Act of 1974.

Software design and developing are not considered production of an article within the meaning of section 222 of the Trade Act. Petitioning workers do not produce an "article" within the meaning of the Trade Act of 1974. Formatted electronic software and codes are not tangible commodities, that is, marketable products, and they are not listed on the Harmonized Tariff Schedule of the United States (HTS), as classified by the United States International Trade Commission (USITC), Office of Tariff Affairs and Trade Agreements, which describes articles imported to the United States.

To be listed in the HTS, an article would be subject to a duty on the tariff schedule and have a value that makes it marketable, fungible and interchangeable for commercial purposes. Although a wide variety of tangible products are described as articles and characterized as dutiable in the HTS, informational products that could historically be sent in letter form and that can currently be electronically transmitted, are not listed in the HTS. Such products are not the type of products that customs officials inspect and that the TAA program was generally designed to address.

The petitioner also alleges that imports impacted layoffs, asserting that because workers lost their jobs due to a transfer of job functions overseas, petitioning workers should be considered import impacted.

The petitioning worker group is not considered to have been engaged in production, thus any foreign transfer of their job duties is irrelevant within the context of eligibility for trade adjustment assistance.

Only in very limited instances are service workers certified for TAA, namely the worker separations must be caused by a reduced demand for their services from a parent or controlling firm or subdivision whose workers produce an article and who are currently under certification for TAA. The investigation revealed no such affiliations.

### Conclusion

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed in Washington, DC, this 31st day of March, 2004.

**Elliott S. Kushner,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. E4-860 Filed 4-15-04; 8:45 am]

BILLING CODE 4510-13-P

## DEPARTMENT OF LABOR

### Employment and Training Administration

[TA-W-53,291B; TA-W-53,291D; and TA-W-53,291E]

#### **Cone Mills Corporation, Cone White Oak, LLC, Division and Corporate Headquarters, Greensboro, NC, Including Sales and Marketing Employees of Cone Mills Corporation Corporate Headquarters Operating at Various Locations in the States of: New York and Virginia; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance**

In accordance with section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on December 3, 2003, applicable to workers of Cone Mills Corporation, Cone White Oak, LLC Division and Corporate Headquarters, Greensboro, North Carolina. The notice will be published soon in the **Federal Register**.

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. New information shows that worker separations have occurred involving employees of the Greensboro, North Carolina facility of Cone Corporation, Corporate Headquarters operating at various locations in the States of New York and Virginia. These employees provide sales and marketing support function services for the production of textile prints and finished denim produced by the subject firm.

Based on these findings, the Department is amending this certification to include sales and marketing employees of the Cone Mills Corporation, Corporate Headquarters, Greensboro, North Carolina, operating at various locations in the States of New York and Virginia.

The intent of the Department's certification is to include all workers of Cone Mills Corporation who were adversely affected by increased imports.

The amended notice applicable to TA-W-53,291B is hereby issued as follows:

All workers of Cone Mills Corporation, Cone White Oak, LLC Division and Corporate Headquarters, Greensboro, North Carolina (TA-W-53,291B), including sales and marketing employees of Cone Mills Corporation, Corporate Headquarters, Greensboro, North Carolina, operating at various locations in the states of New York (TA-W-53,291D) and Virginia (TA-W-53,291E), who became totally or partially separated from employment on or after October 14, 2002, through December 3, 2005, are eligible to apply for adjustment assistance under section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under section 246 of the Trade Act of 1974.

Signed in Washington, DC this 26th day of March, 2004.

**Linda G. Poole,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. E4-864 Filed 4-15-04; 8:45 am]

BILLING CODE 4510-13-P

## DEPARTMENT OF LABOR

### Employment and Training Administration

[TA-W-54,143]

#### **Elizabeth Weaving, Inc., Blacksburg, SC; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance**

In accordance with section 223 of the Trade Act of 1974 (19 U.S.C. 2273), as amended, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on March 2, 2004, applicable to workers of Elizabeth Weaving, Inc., located in Grover, North Carolina. The notice was published in the **Federal Register** on April 6, 2004 (69 FR 18110).

At the request of the State Agency, the Department reviewed the certification for workers of the subject firm. The State provided information citing that the subject firm is located in Blacksburg, South Carolina, not Grover, North Carolina which is the mailing address for Elizabeth Weaving, Inc.

Accordingly, the Department is amending the certification to reflect this matter. The amended notice applicable to TA-W-54,143 is hereby issued as follows:

All workers of Elizabeth Weaving, Inc., Blacksburg, South Carolina, who became totally or partially separated from employment on or after January 21, 2003, through March 2, 2006, are eligible to apply for adjustment assistance under section 223 of the Trade Act of 1974.

Signed in Washington, DC, this 2nd day of March, 2004.

**Elliott S. Kushner,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. E4-859 Filed 4-15-04; 8:45 am]

BILLING CODE 4510-13-P

## DEPARTMENT OF LABOR

### Employment and Training Administration

[TA-W-53,597]

#### **Fashion Technologies, Gaffney, SC; Notice of Affirmative Determination Regarding Application for Reconsideration**

By application postmarked January 31, 2004, a petitioner requested administrative reconsideration of the Department of Labor's Notice of Negative Determination Regarding Eligibility to Apply for Worker Adjustment Assistance, applicable to workers of the subject firm. The denial notice was signed on December 30, 2003, and published in the **Federal Register** on February 6, 2004 (69 FR 5866).

The Department reviewed the request and has determined that the petitioner has provided additional information. Therefore, the Department will conduct further investigation to determine if the workers meet the eligibility requirements of the Trade Act of 1974.

### Conclusion

After careful review of the application, I conclude that the claim is of sufficient weight to justify reconsideration of the Department of Labor's prior decision. The application is, therefore, granted.

Signed in Washington, DC, this 23rd day of March, 2004.

**Linda G. Poole,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. E4-863 Filed 4-15-04; 8:45 am]

BILLING CODE 4510-13-P

## DEPARTMENT OF LABOR

### Employment and Training Administration

[TA-W-51,191]

#### **Getronics Wang Company, LCC, Valley View, OH; Notice of Revised Determination on Remand**

The United States Court of International Trade (USCIT) granted the Secretary of Labor's motion for a

voluntary remand for further investigation in *Former Employees of Getronics Wang Co., LLC v. Elaine Chao, U.S. Secretary of Labor*, No. 03-00529.

The Department's initial determination regarding Getronics Wang Co. LLC (hereafter "Getronics") was issued on April 23, 2003, and published in the **Federal Register** on May 7, 2003 (68 FR 24503). The negative determination was based on the finding that the workers did not produce an article within the meaning of section 222 of the Trade Act of 1974. Workers performed data processing and related services for an unaffiliated company.

By letter dated June 2, 2003, the petitioner requested administrative reconsideration. The Notice of Negative Determination Regarding Application for Reconsideration was signed on June 13, 2003, and published in the **Federal Register** on July 7, 2003 (68 FR 40300). The determination was based on the findings that the workers did not produce an article within the meaning of Section 222 of the Trade Act and that the workers were not service providers in direct support of a Trade Adjustment Assistance (TAA) certified firm.

The remand investigation revealed that Getronics has a contract to provide on site services with a TAA certified company, LTV Steel Company, Inc., Cleveland, Ohio (TA-W-40,786; certified March 21, 2002).

### Conclusion

After careful review of the additional facts obtained on the current remand, I conclude that the subject worker group provided services, the worker group is co-located with a trade-certified firm, and there is a contract between the subject firm and the trade-certified firm. In accordance with the provisions of the Trade Act, I make the following certification:

All workers of Getronics Wang Co., LLC, Valley View, Ohio, who became totally or partially separated from employment on or after March 3, 2002, through two years from the issuance of this revised determination, are eligible to apply for adjustment assistance under section 223 of the Trade Act of 1974.

Signed in Washington, DC this 2nd day of April, 2004.

**Elliott S. Kushner,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. E4-857 Filed 4-15-04; 8:45 am]

BILLING CODE 4510-13-P

## DEPARTMENT OF LABOR

### Employment And Training Administration

[TA-W-53,648]

#### International Business Machines Corporation, Tulsa, Oklahoma; Notice of Negative Determination Regarding Application for Reconsideration

By application of February 6, 2004, a petitioner requested administrative reconsideration of the Department's negative determination regarding eligibility for workers and former workers of the subject firm to apply for Trade Adjustment Assistance (TAA). The denial notice applicable to workers of International Business Machines Corporation, Tulsa, Oklahoma was signed on December 2, 2003, and published in the **Federal Register** on January 16, 2004 (69 FR 2622).

Pursuant to 29 CFR 90.18(c) reconsideration may be granted under the following circumstances:

- (1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;
- (2) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or
- (3) If in the opinion of the Certifying Officer, a misinterpretation of facts or of the law justified reconsideration of the decision.

The TAA petition was filed on behalf of workers at International Business Machines Corporation, Tulsa, Oklahoma, engaged in accounting services. The petition was denied because the workers' firm does not produce an article within the meaning of section 222 of the Trade Act of 1974. Indeed, IBM does not produce an article at the Tulsa facility.

The petitioner refers to the British Petroleum Accounting Center operated by IBM which was certified eligible for TAA in 1999. The petitioner further states that layoffs at the subject firm can be attributed to the decision of British Petroleum to shift its oil production abroad, consequently, the petitioning workers should be eligible for trade adjustment assistance.

A company official was contacted in regard to these allegations. The official stated that there is no affiliation between the subject facility and British Petroleum. It was also revealed that International Business Machines Corporation, Tulsa, Oklahoma provides accounting services to British Petroleum at many locations in the United States

and abroad out of its own facility in Tulsa, Oklahoma.

The fact that service workers have customers or clients that may be eligible for trade adjustment assistance does not automatically make the service workers eligible for TAA. Before service workers can be considered eligible for TAA, they must be in direct support of an affiliated facility currently certified for TAA or employed on a contractual basis at a location currently certified for TAA. This is not the case for the workers at International Business Machines Corporation, Tulsa, Oklahoma.

The petitioner further alleges that "the center in Tulsa, OK has previously been covered under the TRA program," thus petitioning workers of the subject firm should also be eligible for TAA.

The same workers have been providing the same accounting services at the same Tulsa location for a number of years. However, the identity of their employer has changed twice over the pertinent period. Thus, the Department's records indicate workers, including accountants then working at the Tulsa facility, at AMOCO Exploration and Production, and AMOCO Shared Services, operating in the state of Oklahoma, were certified eligible to apply for adjustment assistance on February 19, 1999 (TA-W-36,309N). That certification was amended on March 14, 1999, to reflect new ownership and a name change to BP/AMOCO, AMOCO Exploration and Production, AMOCO Shared Services, A/K/A AMOCO Production Company, Inc., operating in the state of Oklahoma. Workers certified in that instance were determined to be "engaged in activities related to exploration and production of crude oil and natural gas." That certification expired February 19, 2001. Thus, there is no current certification of eligibility for workers at the Tulsa facility. The previous certification has no bearing on the determination of eligibility at this time.

Department records show no previous certifications for the Tulsa facility on the part of the current owner of the Tulsa facility, International Business Machines Corporation, Tulsa, Oklahoma.

The petitioner finally states that International Business Machines Corporation, Tulsa, Oklahoma has moved a significant number of jobs to India.

Accounting services do not constitute production according to the eligibility requirements for trade adjustment assistance. Thus, the alleged shift of jobs to India is irrelevant to this investigation.

Only in very limited instances are service workers certified for TAA. The worker separations must be caused by a reduced demand for their services from a parent or controlling firm or subdivision whose workers produce an article and who are currently under certification for TAA. Unlike the workers at the Tulsa, Oklahoma location employed under the AMOCO corporate umbrella, workers at International Business Machines, Tulsa, Oklahoma do not perform services for a parent or controlling firm or subdivision currently under certification for TAA.

#### Conclusion

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed in Washington, DC, this 31st day of March, 2004.

**Richard Church,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. E4-862 Filed 4-15-04; 8:45 am]

BILLING CODE 4510-13-P

## DEPARTMENT OF LABOR

### Employment and Training Administration

[TA-W-52,050]

#### Merrill Corporation, St. Paul, MN; Notice of Negative Determination on Reconsideration on Remand

The United States Court of International Trade (USCIT) granted the Secretary of Labor's motion for a voluntary remand for further investigation in *Former Employees of Merrill Corporation v. Elaine Chao, U.S. Secretary of Labor*, Court No. 03-00662.

The Department's initial negative determination for the workers of Merrill Corporation (hereafter "Merrill") was issued on July 22, 2003. The notice was published in the **Federal Register** on July 10, 2003 (68 FR 43373). The determination was based on the finding that workers did not produce an article within the meaning of section 222 of the Trade Act of 1974. The Department determined that the subject worker group was not engaged in the production of an article, but rather engaged in activities related to document management services.

On September 9, 2003, the petitioner applied to the U.S. Court of International Trade for administrative

reconsideration, asserting that the subject firm produces an article (documents) and that the workers are engaged in this production.

The petitioner asserted that "[t]ypesetting is an industry that uses raw material (text data) to produce a finished product of economic value"; that workers received text files containing raw data which were sent electronically or in printed form (which had to be converted to an electronic format) and "typeset the information into an electronic format"; and that the file was sent to be printed and/or filed electronically with the Securities Exchange Commission (SEC).

On remand, the Department conducted an investigation to determine whether the company produces an article. In the investigation, the Department reviewed previously-submitted information and requested additional information from the petitioner and the company regarding the functions of the subject worker group and the operations of the company.

The remand investigation revealed that the subject company does not produce an "article" within the meaning of the Trade Act of 1974. The nature of the company is service-oriented.

Merrill describes itself as a "communication and document services company providing printing, photocopying and document management services to the financial, legal, and corporate markets. Merrill's services integrate traditional composition, imaging and printing services with online document management and distribution technology for the preparation and distribution of \* \* \* materials." (Administrative Record, page 12)

A company official reiterated that "Merrill helps clients to prepare required disclosure documents required by the Securities and Exchange Commission (SEC)." (Supplemental Administrative Record, page 10)

Merrill helps its clients prepare and electronically file disclosure documents required by the SEC, such as prospectuses, annual reports and proxy statements. While the documents are valuable as financial records and references, they have no intrinsic value beyond the value of the materials upon which they are recorded (the paper, CD-Rom, floppy disk, etc.) and merely state the economic conditions or status of a company.

The petitioner's submission states that clients submit text files either electronically or in printed form to Merrill's customer service, and that Merrill would either send the electronic

files to the typesetters or convert the printed files into electronic files before sending them to the typesetters. If typesetters receive an unconverted file, they would use proprietary computer applications to convert the file to a form compatible to the program used to manipulate the information into the appropriate format to meet clients' needs and the SEC's filing specifications.

The company's submission is similar to the petitioner's, but supports the position that no article is produced.

According to the company, clients send their documents to Customer Service Group offices which are located throughout the United States and the United Kingdom. The documents are either in electronic or paper form. The Customer Service Group offices then send the documents to the Typesetting Center in St. Paul, Minnesota. The documents may be sent electronically or in print form (and later converted into an electronic format). At the Typesetting Center, typesetters use proprietary software to type, edit and format documents to satisfy client needs and meet the SEC's specifications. Proofreaders audit the documents for accuracy before the documents are filed electronically with the SEC. If a client requests a printed copy of the document, a Customer Services Group office will arrange for the printing.

Throughout the Trade Act, an article is often referenced as something that has a value that makes it marketable, fungible and interchangeable for commercial purposes. The SEC filings are public records and the documents are not sold or marketed individually or as a component to an article.

Because the documents have no commercial value and the company is a service provider, the workers do not produce an article.

#### Conclusion

After reconsideration on remand, I affirm the original notice of negative determination of eligibility to apply for adjustment assistance for workers and former workers of Merrill Corporation, St. Paul, Minnesota.

Signed in Washington, DC this 2nd day of April, 2004.

**Elliott S. Kushner,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. E4-866 Filed 4-15-04; 8:45 am]

BILLING CODE 4510-13-P

**DEPARTMENT OF LABOR****Employment and Training  
Administration**

[TA-W-53,778]

**Park-Ohio, Inc., Geneva Rubber  
Division, Geneva, OH; Notice of  
Negative Determination Regarding  
Application for Reconsideration**

By application of January 31, 2004, the United Steelworkers of America, Local Union 905L requested administrative reconsideration of the Department's negative determination regarding eligibility for workers and former workers of the subject firm to apply for Trade Adjustment Assistance (TAA). The denial notice was signed on January 12, 2004, and published in the **Federal Register** on February 6, 2004 (69 FR 5866).

Pursuant to 29 CFR 90.18(c) reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) If in the opinion of the Certifying Officer, a misinterpretation of facts or of the law justified reconsideration of the decision.

The TAA petition, filed on behalf of workers at Park-Ohio, Inc., Geneva Rubber Division, Geneva, Ohio engaged in the production of conduits and grommets, was denied because criterion (2) was not met. Companywide sales and production of conduits and grommets increased in 2002 compared to 2001 and further increased in January-November 2003 compared to the same period in 2002. In addition, Park-Ohio, Inc. shifted production of conduits and grommets from the subject facility to another domestic location.

In the request for reconsideration, the union alleged that sales and production at the subject facility could not have increased in 2003, because production in Geneva, Ohio was terminated in June of 2003.

It was determined during the original investigation that Park-Ohio, Inc., Geneva Rubber Division, Geneva, Ohio did indeed stop its production in June of 2003. However, all production from this facility was transferred to a new facility in Cleveland, Ohio. The company official was requested to provide companywide sales and production figures for injection rubber molded products which combined both

Geneva and Cleveland facilities. Analysis of this data determined that sales and production at Park-Ohio, Inc. increased during the relevant period.

The union official also alleges that Park-Ohio, Inc. did not shift production from the subject facility domestically, but is shifting it to China and Mexico.

Upon further review of the original investigation and petitioner's correspondence it was revealed that the same union representative who signed a request for reconsideration, also filed the petition for TAA. In the letter attached with the original petition, the union representative states that "\* \* \* Park-Ohio Industries illegally moved our work to another facility in Cleveland \* \* \*", which contradicts the petitioner's later allegations that there was no domestic shift in production. Furthermore, the Department received several statements from the company official of Park-Ohio, Inc. that confirm all production of conduits and grommets was shifted from the subject facility to a new facility in Cleveland, Ohio.

**Conclusion**

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed in Washington, DC, this 26th day of March, 2004.

**Linda G. Poole,**

*Certifying Officer, Division of Trade  
Adjustment Assistance.*

[FR Doc. E4-861 Filed 4-15-04; 8:45 am]

**BILLING CODE 4510-13-P**

**DEPARTMENT OF LABOR****Employment and Training  
Administration**

[TA-W-54,149]

**Schott Scientific Glass, Inc.,  
Parkersburg, WV; Amended  
Certification Regarding Eligibility To  
Apply for Worker Adjustment  
Assistance and Alternative Trade  
Adjustment Assistance**

In accordance with section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on February 23, 2004, applicable to workers of Schott Scientific Glass, Inc., Parkersburg, West

Virginia. The notice will be published soon in the **Federal Register**.

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers produce tubing and are not separately identifiable by product line.

New findings show that there was a previous certification, TA-W-40,263, issued on February 20, 2002, for workers of Schott Scientific Glass, Inc., Parkersburg, West Virginia who were engaged in employment related to the production of tubing. That certification expired February 20, 2004. To avoid an overlap in worker group coverage, the certification is being amended to change the impact date from February 2, 2003 to February 21, 2004, for workers of the subject firm.

The amended notice applicable to TA-W-54,149 is hereby issued as follows:

All workers of Schott Scientific Glass, Inc., Parkersburg, West Virginia, who became totally or partially separated from employment on or after February 21, 2004, through February 23, 2006, are eligible to apply for adjustment assistance under section 223, and alternative trade adjustment assistance under section 246 of the Trade Act of 1974.

Signed in Washington, DC, this 1st day of April, 2004.

**Richard Church,**

*Certifying Officer, Division of Trade  
Adjustment Assistance.*

[FR Doc. E4-858 Filed 4-15-04; 8:45 am]

**BILLING CODE 4510-13-P**

**DEPARTMENT OF LABOR****Employment and Training  
Administration**

[TA-W-52,777]

**Steelcase, Inc., Grand Rapids,  
Michigan; Amended Notice of Revised  
Determination on Reconsideration  
Regarding Eligibility To Apply for  
Worker Adjustment Assistance and  
Alternative Trade Adjustment  
Assistance**

In accordance with section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a Notice of Revised Determination on Reconsideration Regarding Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on December 11, 2003, applicable to workers of Steelcase, Inc., Grand Rapids, Michigan. The notice was published in the **Federal Register** on January 7, 2004 (69 FR 943-944).

At the request of a state representative, the Department reviewed the certification for workers of the subject firm. New information shows that leased workers of RCM Technologies were employed at Steelcase, Inc. at the Grand Rapids, Michigan location of the subject firm.

Based on these findings, the Department is amending this certification to include leased workers of RCM Technologies working at Steelcase, Inc., Grand Rapids, Michigan.

The intent of the Department's certification is to include all workers employed at Steelcase, Inc., Grand Rapids, Michigan who were adversely affected by increased imports.

The amended notice applicable to TA-W-52,777 is hereby issued as follows:

All workers of Steelcase, Inc., Grand Rapids, Michigan, including leased workers of RCM Technologies, working at Steelcase, Inc., Grand Rapids, Michigan, who became totally or partially separated from employment on or after August 12, 2002, through December 11, 2005, are eligible to apply for adjustment assistance under section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under section 246 of the Trade Act of 1974.

Signed in Washington, DC this 30th day of March, 2004.

**Elliott S. Kushner,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. E4-865 Filed 4-15-04; 8:45 am]

BILLING CODE 4510-13-P

## DEPARTMENT OF LABOR

### Employment Standards Administration Wage and Hour Division

#### Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions

General wage determination decisions of the Secretary of Labor are issued in accordance with applicable law and are based on the information obtained by the Department of Labor from its study of local wage conditions and data made available from other sources. They specify the basic hourly wage rates and fringe benefits which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character and in the localities specified therein.

The determination in these decisions of prevailing rates and fringe benefits have been made in accordance with 29 CFR part 1, by authority of the Secretary of Labor pursuant to the provisions of

the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR part 1, appendix, as well as such additional statutes as may from time to time be enacted containing provisions for the payment of wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act. The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the character and in the localities described herein.

Good cause is hereby found for not utilizing notice and public comment procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue current construction industry wage determinations frequently and in large volume causes procedures to be impractical and contrary to the public interest.

General wage determination decisions, and modifications and supersedes decisions thereto, contain no expiration dates and are effective from their date of notice in the **Federal Register**, or on the date written notice is received by the agency, whichever is earlier. These decisions are to be used in accordance with the provisions of 29 CFR parts 1 and 5. Accordingly, the applicable decision, together with any modifications issued, must be made a part of every contract for performance of the described work within the geographic area indicated as required by an applicable Federal prevailing wage law and 29 CFR part 5. The wage rates and fringe benefits, notice of which is published herein, and which are contained in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under the Davis-Bacon and Related Acts," shall be the minimum paid by contractors and subcontractors to laborers and mechanics.

Any person, organization, or governmental agency having an interest in the rates determined as prevailing is encouraged to submit wage rate and fringe benefit information for consideration by the Department.

Further information and self-explanatory forms for the purpose of submitting this data may be obtained by writing to the U.S. Department of Labor, Employment Standards Administration,

Wage and Hour Division, Division of Wage Determinations, 200 Constitution Avenue, NW., Room S-3014, Washington, DC. 20210.

#### Modification to General Wage Determination Decisions

The number of the decisions listed to the Government Printing Office document entitled "General Wage Determinations Issued Under the Davis-Bacon and Related Acts" being modified are listed by Volume and State. Dates of publication in the **Federal Register** are in parentheses following the decisions being modified.

##### Volume I

None

##### Volume II

Delaware

DE030005 (Jun. 13, 2003)

Maryland

MD030030 (Jun. 13, 2003)

MD030047 (Jun. 13, 2003)

MD030050 (Jun. 13, 2003)

MD030053 (Jun. 13, 2003)

Pennsylvania

PA030001 (Jun. 13, 2003)

PA030002 (Jun. 13, 2003)

PA030003 (Jun. 13, 2003)

PA030004 (Jun. 13, 2003)

PA030007 (Jun. 13, 2003)

PA030008 (Jun. 13, 2003)

PA030010 (Jun. 13, 2003)

PA030011 (Jun. 13, 2003)

PA030013 (Jun. 13, 2003)

PA030014 (Jun. 13, 2003)

PA030015 (Jun. 13, 2003)

PA030017 (Jun. 13, 2003)

PA030018 (Jun. 13, 2003)

PA030019 (Jun. 13, 2003)

PA030020 (Jun. 13, 2003)

PA030023 (Jun. 13, 2003)

PA030024 (Jun. 13, 2003)

PA030027 (Jun. 13, 2003)

PA030030 (Jun. 13, 2003)

PA030032 (Jun. 13, 2003)

PA030038 (Jun. 13, 2003)

PA030040 (Jun. 13, 2003)

##### Volume III

Alabama

AL030004 (Jun. 13, 2003)

AL030006 (Jun. 13, 2003)

AL030008 (Jun. 13, 2003)

AL030017 (Jun. 13, 2003)

AL030033 (Jun. 13, 2003)

Kentucky

KY030001 (Jun. 13, 2003)

KY030003 (Jun. 13, 2003)

KY030025 (Jun. 13, 2003)

KY030029 (Jun. 13, 2003)

South Carolina

SC030033 (Jun. 13, 2003)

##### Volume IV

Illinois

IL030001 (Jun. 13, 2003)

IL030007 (Jun. 13, 2003)

IL030016 (Jun. 13, 2003)

Minnesota

MN030009 (Jun. 13, 2003)

Ohio

OH030001 (Jun. 13, 2003)  
 OH030002 (Jun. 13, 2003)  
 OH030003 (Jun. 13, 2003)  
 OH030029 (Jun. 13, 2003)  
 OH030032 (Jun. 13, 2003)  
 OH030036 (Jun. 13, 2003)

#### Wisconsin

WI030001 (Jun. 13, 2003)  
 WI030019 (Jun. 13, 2003)

#### Volume V

#### Kansas

KS030006 (Jun. 13, 2003)  
 KS030007 (Jun. 13, 2003)  
 KS030008 (Jun. 13, 2003)  
 KS030009 (Jun. 13, 2003)  
 KS030012 (Jun. 13, 2003)  
 KS030013 (Jun. 13, 2003)  
 KS030015 (Jun. 13, 2003)  
 KS030018 (Jun. 13, 2003)  
 KS030019 (Jun. 13, 2003)  
 KS030020 (Jun. 13, 2003)  
 KS030022 (Jun. 13, 2003)  
 KS030023 (Jun. 13, 2003)  
 KS030026 (Jun. 13, 2003)

#### Missouri

MO030001 (Jun. 13, 2003)  
 MO030002 (Jun. 13, 2003)  
 MO030004 (Jun. 13, 2003)  
 MO030006 (Jun. 13, 2003)  
 MO030007 (Jun. 13, 2003)  
 MO030008 (Jun. 13, 2003)  
 MO030011 (Jun. 13, 2003)  
 MO030012 (Jun. 13, 2003)  
 MO030019 (Jun. 13, 2003)  
 MO030020 (Jun. 13, 2003)  
 MO030043 (Jun. 13, 2003)  
 MO030045 (Jun. 13, 2003)  
 MO030050 (Jun. 13, 2003)  
 MO030052 (Jun. 13, 2003)  
 MO030054 (Jun. 13, 2003)  
 MO030055 (Jun. 13, 2003)  
 MO030056 (Jun. 13, 2003)  
 MO030058 (Jun. 13, 2003)  
 MO030060 (Jun. 13, 2003)  
 MO030061 (Jun. 13, 2003)

#### Nebraska

NE030001 (Jun. 13, 2003)  
 NE030003 (Jun. 13, 2003)  
 NE030005 (Jun. 13, 2003)  
 NE030007 (Jun. 13, 2003)  
 NE030009 (Jun. 13, 2003)  
 NE030010 (Jun. 13, 2003)  
 NE030011 (Jun. 13, 2003)

#### New Mexico

NM030001 (Jun. 13, 2003)  
 NM030005 (Jun. 13, 2003)  
 NM030011 (Jun. 13, 2003)

#### Volume VI

#### Alaska

AK030001 (Jun. 13, 2003)  
 AK030005 (Jun. 13, 2003)  
 AK030006 (Jun. 13, 2003)

#### Colorado

CO030005 (Jun. 13, 2003)  
 CO030006 (Jun. 13, 2003)  
 CO030011 (Jun. 13, 2003)  
 CO030012 (Jun. 13, 2003)  
 CO030013 (Jun. 13, 2003)  
 CO030016 (Jun. 13, 2003)

#### Oregon

OR030001 (Jun. 13, 2003)  
 OR030002 (Jun. 13, 2003)  
 OR030003 (Jun. 13, 2003)

#### Washington

WA030001 (Jun. 13, 2003)  
 WA030003 (Jun. 13, 2003)  
 WA030005 (Jun. 13, 2003)  
 WA030007 (Jun. 13, 2003)  
 WA030008 (Jun. 13, 2003)

#### Volume VII

None

### General Wage Determination Publication

General wage determinations issued under the Davis-Bacon and Related Acts, including those noted above, may be found in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under the Davis-Bacon and Related Acts". This publication is available at each of the 50 Regional Government Depository Libraries and many of the 1,400 Government Depository Libraries across the country.

General wage determinations issued under the Davis-Bacon and Related Acts are available electronically at no cost on the Government Printing Office site at [www.access.gpo.gov/davisbacon](http://www.access.gpo.gov/davisbacon). They are also available electronically by subscription to the Davis-Bacon Online Service (<http://davisbacon.fedworld.gov>) of the National Technical Information Service (NTIS) of the U.S. Department of Commerce at 1-800-363-2068. This subscription offers value-added features such as electronic delivery of modified wage decisions directly to the user's desktop, the ability to access prior wage decisions issued during the year, extensive Help Desk Support, etc.

Hard-copy subscriptions may be purchased from: Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, (202) 512-1800.

When ordering hard-copy subscription(s), be sure to specify the State(s) of interest, since subscriptions may be ordered for any or all of the six separate volumes, arranged by State. Subscriptions include an annual edition (issued in January or February) which includes all current general wage determinations for the States covered by each volume. Throughout the remainder of the year, regular weekly updates will be distributed to subscribers.

Signed at Washington, DC, this 8th day of April, 2004.

**John Frank,**

*Acting Chief, Branch of Construction Wage Determinations.*

[FR Doc. 04-8399 Filed 4-15-04; 8:45 am]

**BILLING CODE 4510-27-M**

## DEPARTMENT OF LABOR

### Mine Safety and Health Administration

#### Hazardous Conditions Complaints

**ACTION:** Notice.

**SUMMARY:** The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) (44 U.S.C. 3506 (c)(2)(A)). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

**DATES:** Submit comments on or before June 15, 2004.

**ADDRESSES:** Send comments to Darrin A. King, Chief, Records Management Branch, 1100 Wilson Boulevard, Room 2139, Arlington, VA 22209-3939. Commenters are encouraged to send their comments on computer disk, or via e-mail to [king.darrin@dol.gov](mailto:king.darrin@dol.gov). Mr. King can be reached at (202) 693-9838 (voice), or (202) 693-9801 (facsimile).

**FOR FURTHER INFORMATION CONTACT:** Contact the employee listed in the **ADDRESSES** section of this notice.

#### SUPPLEMENTARY INFORMATION:

#### I. Background

Section 103(g) of the Federal Mine Safety and Health Act of 1977 (Pub. L. 95-164, as amended by Pub. L. 95-164) (Mine Act), states that a representative of miners, or any individual miner where this is no miners representative, may submit a written or oral notification of alleged violation of the Mine Act or a mandatory standard or of an imminent danger. Such notification requires the Mine Safety and Health Administration (MSHA) to make an immediate inspection. A copy of the notice must be provided to the operator.

Title 30, Code of Federal Regulations (30 CFR), part 43, implements section 103(g) of the Mine Act. It provides the procedures for submitting notification of the alleged violation and the actions which MSHA must take after receiving the notice. Although the regulation contains a review procedure (required by section 103(g)(2) of the Mine Act) whereby a miner or a representative of miners may in writing request a review

if no citation or order is written as a result of the original notice, the option is so rarely used that it was not considered in the burden estimates.

## II. Desired Focus of Comments

MSHA is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

A copy of the proposed information collection request can be obtained by contacting the employee listed in the **ADDRESSES** section of this notice or viewed on the Internet by accessing the MSHA home page (<http://www.msha.gov>) and then choosing "Statutory and Regulatory Information" and "Federal Register Documents."

## III. Current Actions

Currently, MSHA is soliciting comments concerning the extension of the information collection requirements related to 30 CFR 43.4 (Requirements for giving notice) and 43.7 (Informal review upon written notice given to an inspector on the mine premises).

*Type of Review:* Extension.

*Agency:* Mine Safety and Health Administration.

*Title:* Hazardous Conditions Complaints.

*OMB Number:* 1219-0014.

*Affected Public:* Business or other for-profit.

*Frequency:* On occasion.

*Number of Respondents:* 1,003.

*Total Burden Hours:* 201.

*Total Burden Cost (capital/startup):* \$0.

*Total Burden Cost (operating/maintaining):* \$0.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated in Arlington, Virginia, this 8th day of April, 2004.

**David L. Meyer,**

*Director, Office of Administration and Management.*

[FR Doc. 04-8645 Filed 4-15-04; 8:45 am]

**BILLING CODE 4510-43-P**

## DEPARTMENT OF LABOR

### Mine Safety and Health Administration

#### Proposed Information Collection Request Submitted for Public Comment and Recommendations; Mine Ventilation System Plan

**ACTION:** Notice.

**SUMMARY:** The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506 (c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

Currently, the Mine Safety and Health Administration (MSHA) is soliciting comments concerning the extension of the information collection related to the compliance with standards (30 CFR 57.8520 and 57.8525). The ventilation system is the most vital life support system in underground mining and a properly operating ventilation system is essential for maintaining a safe and healthful working environment. A well planned mine ventilation system is necessary to assure a fresh air supply to miners at all working places, to control the amounts of harmful airborne contaminants in the mine atmosphere, and to dilute possible accumulation of explosive gases. Lack of adequate ventilation in underground mines has resulted in fatalities from asphyxiation and explosions due to a buildup of explosive gases.

**DATES:** Submit comments on or before June 15, 2004.

**ADDRESSES:** Send comments to Darrin A. King, Chief, Records Management Branch, 1100 Wilson Boulevard, Room 2139, Arlington, VA 22209-3939. Commenters are encouraged to send their comments on computer disk, or via

e-mail to [king.darrin@dol.gov](mailto:king.darrin@dol.gov). Mr. King can be reached at (202) 693-9838 (voice), or (202) 693-9801 (facsimile).

**FOR FURTHER INFORMATION CONTACT:**

Contact the employee listed in the **ADDRESSES** section of this notice.

#### SUPPLEMENTARY INFORMATION:

### I. Background

Underground mines present harsh and hostile working environments. The ventilation system is the most vital life support system in underground mining and a properly operating ventilation system is essential for maintaining a safe and healthful working environment. Inadequate ventilation can be a primary factor for deaths caused by disease of the lungs (e.g., silicosis). In addition, poor working conditions from lack of adequate ventilation contribute to accidents resulting from heat stress, limited visibility, or impaired judgment from contaminants.

### II. Desired Focus of Comments

MSHA is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

A copy of the proposed information collection request can be obtained by contacting the employee listed in the **ADDRESSES** section of this notice or viewed on the Internet by accessing the MSHA home page (<http://www.msha.gov>) and then choosing "Statutory and Regulatory Information" and "Federal Register Documents."

### III. Current Actions

Currently, the Mine Safety and Health Administration (MSHA) is soliciting comments concerning the proposed extension of the information collection related to ventilation and main fan maintenance.

*Type of Review:* Extension.

*Agency:* Mine Safety and Health Administration.

*Title:* Ventilation Plan and Main Fan Maintenance Record.

*OMB Number:* 1219-0016.

*Affected Public:* Business or other for-profit.

*Frequency:* Annually and on occasion.  
*Respondents:* 258.

*Estimated Time Per Respondent:* 25 hours.

*Total Burden Hours:* 6,375.

*Total Burden Cost (capital/startup):* \$0.

*Total Burden Cost (operating/maintaining):* \$0.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated at Arlington, Virginia, this 8th day of April, 2004.

**David L. Meyer,**

*Director, Office of Administration and Management.*

[FR Doc. 04-8646 Filed 4-15-04; 8:45 am]

**BILLING CODE 4510-43-P**

## LEGAL SERVICES CORPORATION

### Notice of Availability of Calendar Year 2005 Competitive Grant Funds

**AGENCY:** Legal Services Corporation.

**ACTION:** Solicitation for proposals for the provision of civil legal services.

**SUMMARY:** The Legal Services Corporation (LSC) is the national organization charged with administering federal funds provided for civil legal services to low-income people.

LSC hereby announces the availability of competitive grant funds and is soliciting grant proposals from interested parties who are qualified to provide effective, efficient and high quality civil legal services to eligible clients in the service area(s) of the states and territories identified below. The exact amount of congressionally appropriated funds and the date, terms and conditions of their availability for calendar year 2005 have not been determined.

**DATES:** See **SUPPLEMENTARY INFORMATION** section for grants competition dates.

**ADDRESSES:** Legal Services Corporation—Competitive Grants, 3333 K Street, NW., Third Floor, Washington, DC 20007-3522.

**FOR FURTHER INFORMATION CONTACT:** Office of Program Performance by e-mail at [competition@lsc.gov](mailto:competition@lsc.gov), or visit the grants competition Web site at [www.ain.lsc.gov](http://www.ain.lsc.gov).

**SUPPLEMENTARY INFORMATION:** The Request for Proposals (RFP) will be available April 23, 2004. Applicants must file a Notice of Intent to Compete (NIC) to participate in the competitive grants process.

Applicants competing for service areas in Alabama, Arizona, Arkansas, California, Illinois, Kentucky, Louisiana, Michigan, Missouri, New Mexico, New York, North Dakota, Ohio, Oklahoma, Puerto Rico, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia, and Wisconsin must file the NIC by May 21, 2004, 5 p.m. e.t. The due date for filing grant proposals for service areas in these locations is June 18, 2004, 5 p.m. e.t.

Applicants competing for service areas in Massachusetts and Minnesota must file the NIC by July 9, 2004, 5 p.m. e.t. The due date for filing grant proposals for service areas in these states is August 6, 2004, 5 p.m. e.t.

LSC is seeking proposals from: (1) Non-profit organizations that have as a purpose the provision of legal assistance to eligible clients; (2) private attorneys; (3) groups of private attorneys or law firms; (4) State or local governments; and (5) sub-state regional planning and coordination agencies that are composed of sub-state areas and whose governing boards are controlled by locally elected officials.

The RFP, containing the NIC and grant application, guidelines, proposal content requirements, service area descriptions, and specific selection criteria, will be available from [www.ain.lsc.gov](http://www.ain.lsc.gov) April 23, 2004. LSC will not fax the RFP to interested parties.

Below are the service areas for which LSC is requesting grant proposals. Service area descriptions will be available from Appendix A of the RFP. Interested parties are asked to visit [www.ain.lsc.gov](http://www.ain.lsc.gov) regularly for updates on the LSC competitive grants process.

| State               | Service Area   |
|---------------------|--|
| Alabama .....       | AL-4   |
| Arizona .....       | AZ-2, AZ-3, AZ-5,<br>MAZ, NAZ-5, NAZ-6               |
| Arkansas .....      | AR-6, AR-7   |
| California .....    | CA-1, NCA-1, CA-27,<br>CA-28                         |
| Illinois .....      | IL-3, IL-7   |
| Kentucky .....      | KY-2, KY-5, KY-9, KY-<br>10                          |
| Louisiana .....     | LA-1, LA-12  |
| Massachusetts ..... | MA-4, MA-10, MA-11,<br>MA-12                         |
| Michigan .....      | MI-9, MI-12, MI-13, MI-<br>14, MI-15, MMI, NMI-<br>1 |
| Minnesota .....     | MN-1, MN-4, MN-5,<br>MN-6, MMN, NMN-1                |

| State                | Service Area   |
|----------------------|--|
| Missouri .....       | MO-3, MO-4, MO-5,<br>MO-7, MMO                             |
| New Mexico .....     | NM-1, NM-5, MNM,<br>NNM-2, NNM-4                           |
| New York .....       | NY-9   |
| North Dakota .....   | ND-3, MND, NND-3   |
| Ohio .....           | OH-5, OH-17, OH-18,<br>OH-19, OH-20, OH-<br>21, OH-22, MOH |
| Oklahoma .....       | NOK-1  |
| Puerto Rico .....    | PR-1, PR-2, MPR  |
| South Carolina ..... | SC-8, MSC  |
| South Dakota .....   | SD-2, SD-4, MSD,<br>NSD-1                                  |
| Tennessee .....      | TN-4, TN-7, TN-9, TN-<br>10                                |
| Texas .....          | TX-13, TX-14, TX-15,<br>NTX-1                              |
| Virginia .....       | VA-17, VA-18, VA-19,<br>VA-20, MVA                         |
| West Virginia .....  | WV-5, MWV  |
| Wisconsin .....      | WI-5, MWI  |

Dated: April 6, 2004.

**Michael A. Genz,**

*Director, Office of Program Performance,  
Legal Services Corporation.*

[FR Doc. 04-8430 Filed 4-15-04; 8:45 am]

**BILLING CODE 7050-01-P**

## NATIONAL CREDIT UNION ADMINISTRATION

### Sunshine Act Meeting

It has been determined by the National Credit Union Administration Board that it will be necessary to change the time of the previously announced closed Board meeting (**Federal Register**, Vol. 69, No. 70, page 19240, April 12, 2004) scheduled for Thursday, April 15, 2004 at 11:30 a.m. The meeting will now be held at 9 a.m. Earlier announcement of this change was not possible.

*For Further Information Contact:* Becky Baker, Secretary of the Board, Telephone (703) 518-6304.

**Becky Baker,**

*Secretary of the Board.*

[FR Doc. 04-8690 Filed 4-15-04; 8:45 am]

**BILLING CODE 7535-01-M**

## NATIONAL SCIENCE FOUNDATION

### Advisory Committee for Education and Human Resources; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92-463, as amended), the National Science Foundation announces the following meeting.

*Name:* Advisory Committee for Education and Human Resources (ACEHR) (#1119).

*Date and Time:* May 12, 8:30 a.m.–6 p.m.; May 13, 8:30 a.m.–3 p.m.

*Place:* National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230.

*Type of Meeting:* Open.

*For Further Information Contact:* Sheila R. Tyndell, Staff Assistant, Directorate for Education and Human Resources, National Science Foundation, 4201 Wilson Boulevard, Room 805, Arlington, VA 22230, 703–292–8601.

*Summary Minutes:* May be obtained from contact person listed above.

*Purpose of Meeting:* To provide advice and recommendations concerning NSF support for Education and Human Resources.

*Agenda:* Discussion of FY 2004 programs of the Directorate for Education and Human Resources and planning for future activities.

Dated: April 12, 2004.

**Susanne Bolton,**

*Committee Management Officer, HRM.*

[FR Doc. 04–8668 Filed 4–15–04; 8:45 am]

**BILLING CODE 7555–01–M**

## NATIONAL SCIENCE FOUNDATION

### Advisory Committee for Engineering; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended) the National Science Foundation announces the following meeting.

*Name and Committee Code:* Advisory Committee for Engineering (#1170).

*Date and Time:* May 19, 2004, 8:30 a.m.–5:30 p.m.; May 20, 2004, 8:30 a.m.–12 p.m.

*Place:* National Science Foundation, Room 1235, 4201 Wilson Boulevard, Arlington, Virginia 22230.

*Type of Meeting:* Open.

*For Further Information Contact:* Ms. Deborah B. Young, Administrative Officer, Office of the Assistant Director for Engineering, National Science Foundation, Suite 505, 4201 Wilson Boulevard, Arlington, VA 22230; Telephone: (703) 292–8301. If you are attending the meeting and need access to the NSF building, please contact Alice Furtner or Cassandra Queen at 703–292–8300 or at [afurtner@nsf.gov](mailto:afurtner@nsf.gov) or [cqueen@nsf.gov](mailto:cqueen@nsf.gov) so that your name can be added to the building access list.

*Minutes:* May be obtained from the contact person listed above.

*Purpose of Meeting:* To provide advice, recommendations and counsel on major goals and policies pertaining to engineering programs and activities.

*Agenda:* The principal focus of the forthcoming meeting will be on strategic issues, both for the Directorate and the Foundation as a whole. The Committee will also address matters relating to the future of the engineering profession, and engineering education.

Dated: April 12, 2004.

**Susanne Bolton,**

*Committee Management Officer.*

[FR Doc. 04–8669 Filed 4–15–04; 8:45 am]

**BILLING CODE 7555–01–M**

## NUCLEAR REGULATORY COMMISSION

### Request To Amend a License To Import Radioactive Waste

Pursuant to 10 CFR 110.70(C) “Public notice of receipt of an application,” please take notice that the Nuclear Regulatory Commission has received the following request to amend an import license. Copies of the request are available electronically through ADAMS and can be accessed through the Public Electronic Reading Room (PERR) link <http://www.nrc.gov/NRC/ADAMS/index.html> at the NRC Homepage.

A request for a hearing or petition for leave to intervene may be filed within 30 days after publication of this notice in the **Federal Register**. Any request for hearing or petition for leave to intervene shall be served by the requestor or petitioner upon the applicant, the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555; the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555; and the Executive Secretary, U.S. Department of State, Washington, DC 20520.

The information concerning this amendment request follows.

### NRC IMPORT LICENSE AMENDMENT APPLICATION

| Name of applicant<br>date of application                     | Date received appli-<br>cation number/docket<br>number | Description of material  |  | End use   | Country of origin |
|--|--|--|--|---|-------------------|
|  |  | Material type  | Total qty  |   |                   |
| Diversified Scientific<br>Services, Inc.,<br>March 18, 2004. | March 25, 2004,<br>IW012/01,<br>11005322.              | Class A radioactive<br>mixed waste in var-<br>ious forms includ-<br>ing solids, semi-sol-<br>ids, and liquids. | 378,000 kg mixed<br>waste containing<br>1,200 curies tritium,<br>carbon-14, mixed<br>fission product<br>radionuclides and<br>other contaminants. | Amend to: (1) in-<br>crease quantity of<br>material; and (2)<br>extend expiration<br>date to 3/31/2006. | Canada            |

For the Nuclear Regulatory Commission.

Dated this 7th day of April 2004 at  
Rockville, Maryland.

**Edward T. Baker,**

*Deputy Director, Office of International  
Programs.*

[FR Doc. 04–8635 Filed 4–15–04; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

### Review and Status of Surface and Volumetric Survey Design and Analysis Using Spatial Analysis and Decision Assistance (SADA) Methods; Public Workshop

**AGENCY:** Nuclear Regulatory  
Commission.

**ACTION:** Notice of workshop.

**SUMMARY:** The NRC will hold a public workshop in Rockville, Maryland, to provide the NRC staff and the public with an overview of progress on the development of a new computational tool for use in the evaluation of sites

with subsurface contamination. Spatial Analysis and Decision Assistance (SADA) is a freeware software program that is being supported jointly by several Federal Agencies. SADA utilizes automated surveying designs and analytical tools to enhance the demonstration of compliance with criteria for volumetric contaminants and to test and evaluate alternative survey designs. Distributions and total contaminant inventories are sometimes required to assist in determining risk and/or compliance.

Presenters at the workshop will provide information on federally-sponsored survey design and analytical approaches under development for volumetric assessments. The emphasis

of the workshop will focus on the Multi-Agency Radiation Survey & Site Investigation Manual (MARSSIM) evolution into Geostatistical and Bayesian approaches to surficial and, in particular, volumetric contamination characterization and analysis. This information will be useful to the NRC in developing realistic guidance for implementations requiring sub-surface or volumetric knowledge. All interested licensees and members of the public are invited to attend this workshop.

**DATES:** The workshop will be held on May 4th and 5th, 2004 from 8 a.m. to about 5 p.m. Registration is requested at <http://www.tiem.utk.edu/-sada/> to help plan for security issues and determine how many CD copies of the Beta SADA software will have to be prepared for distribution.

**ADDRESSES:** The public workshop will be held in the NRC auditorium at Two White Flint North, 11545 Rockville Pike, Rockville, Maryland.

**FOR FURTHER INFORMATION CONTACT:** Designated Federal Official: Cheryl A. Trottier (301) 415-6232. General Information: George E. Powers, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone (301) 415-6212, fax (301) 415-5385, e-mail: [GEP@NRC.GOV](mailto:GEP@NRC.GOV). The workshop program can be viewed at <http://www.tiem.utk.edu/-sada/>.

**SUPPLEMENTARY INFORMATION:** This workshop is one of a series of interactions with the Agreement States, licensees, and the public to inform and gather suggestions and ideas for improving performance based protocols for conducting surveys that must consider volumetric geometries. Techniques that apply Bayesian and geostatistical methods are showing promise in reducing the resources required to evaluate volumetric contamination while increasing the accuracy and precision of the results. Therefore, the NRC staff is considering expanding and extending the performance guidance for conducting volumetric surveys by applying statistics such as Bayesian and geostatistical analysis that may be more appropriate for use in assessments. The workshop will include brief formal presentations by invited speakers from DOE national laboratories, EPA and other Federal Agencies. These presentations will address survey techniques that can be applied up to the initiation of volumetric sampling and analysis. Question and answer periods will be provided.

Visitor parking around the NRC building is limited; however, the

workshop site is located adjacent to the White Flint Station on the Metro Red Line. Seating for the public will be on a first-come, first-served basis.

Dated at Rockville, Maryland this 12th day of April, 2004.

For the Nuclear Regulatory Commission,  
**Cheryl A. Trottier,**  
*Chief, Radiation Protection and Health Effects Branch, Division of Regulatory Applications, Office of Nuclear Regulatory Research.*  
[FR Doc. 04-8634 Filed 4-15-04; 8:45 am]  
**BILLING CODE 7590-01-P**

## PENSION BENEFIT GUARANTY CORPORATION

### Required Interest Rate Assumption for Determining Variable-Rate Premium for Premium Payment Years Beginning in January Through April 2004

**AGENCY:** Pension Benefit Guaranty Corporation.

**ACTION:** Notice of interest rate assumptions.

**SUMMARY:** This notice informs the public of the interest rate assumptions to be used for determining the variable-rate premium under part 4006 of the Pension Benefit Guaranty Corporation regulations for premium payment years beginning in January through April 2004. These interest rate assumptions can be derived from rates published elsewhere, but are collected and published in this notice for the convenience of the public. Interest rates are also published on the PBGC's Web site (<http://www.pbgc.gov>).

The provisions of the Job Creation and Worker Assistance Act of 2002 that temporarily increased the required interest rate to be used to determine the PBGC's variable-rate premium to 100 percent (from 85 percent) of the annual yield on 30-year Treasury securities expired at the end of 2003. The Pension Funding Equity Act of 2004, which was signed into law by the President on April 10, 2004, changes the rules for determining the required interest rate for premium payment years beginning in 2004 or 2005. On April 15, 2004, the PBGC published a notice informing the public of interest rates and assumptions to be used under certain PBGC regulations. The April 15, 2004, notice stated that the PBGC intended shortly to publish a **Federal Register** notice reflecting the new required interest rates. The PBGC is now informing the public of those new required interest rates for premium payment years beginning in January through April 2004.

**DATES:** The required interest rate assumption for determining the variable-rate premium under part 4006 applies to premium payment years beginning in January through April 2004.

**FOR FURTHER INFORMATION CONTACT:** Harold J. Ashner, Assistant General Counsel, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005, 202-326-4024. (TTY/TDD users may call the Federal relay service toll-free at 1-800-877-8339 and ask to be connected to 202-326-4024.)

## SUPPLEMENTARY INFORMATION:

### Variable-Rate Premiums

Section 4006(a)(3)(E)(iii)(II) of the Employee Retirement Income Security Act of 1974 (ERISA) and § 4006.4(b)(1) of the PBGC's regulation on Premium Rates (29 CFR part 4006) prescribe use of an assumed interest rate (the "required interest rate") in determining a single-employer plan's variable-rate premium. The required interest rate is the "applicable percentage" (currently 85 percent) of the annual yield on 30-year Treasury securities for the month preceding the beginning of the plan year for which premiums are being paid (the "premium payment year"). The provisions of the Job Creation and Worker Assistance Act of 2002 that temporarily increased the required interest rate to be used to determine the PBGC's variable-rate premium to 100 percent (from 85 percent) of the annual yield on 30-year Treasury securities expired at the end of 2003.

The Pension Funding Equity Act of 2004, which was signed into law by the President on April 10, 2004, changes the rules for determining the required interest rate for premium payment years beginning in 2004 or 2005. For premium payment years beginning in 2004 or 2005, the required interest rate is the "applicable percentage" (currently 85 percent) of the annual rate of interest determined by the Secretary of the Treasury on amounts invested conservatively in long-term investment grade corporate bonds for the month preceding the beginning of the plan year for which premiums are being paid. On April 12, 2004, the Internal Revenue Service issued Notice 2004-34 announcing the composite corporate bond rates needed to determine the required interest rates for premium payment years beginning in January through April 2004. (See Table 1 of IRS Notice 2004-34.)

The required interest rate to be used in determining variable-rate premiums for premium payment years beginning

in January 2004 is 4.94 percent (*i.e.*, 85 percent of the 5.81 percent composite corporate bond rate announced in IRS Notice 2004-34 for December 2003).

The required interest rate to be used in determining variable-rate premiums for premium payment years beginning in February 2004 is 4.83 percent (*i.e.*, 85 percent of the 5.68 percent composite corporate bond rate announced in IRS Notice 2004-34 for January 2004).

The required interest rate to be used in determining variable-rate premiums for premium payment years beginning in March 2004 is 4.79 percent (*i.e.*, 85 percent of the 5.63 percent composite corporate bond rate announced in IRS Notice 2004-34 for February 2004).

The required interest rate to be used in determining variable-rate premiums for premium payment years beginning in April 2004 is 4.62 percent (*i.e.*, 85 percent of the 5.44 percent composite corporate bond rate announced in IRS Notice 2004-34 for March 2004).

The following table lists the required interest rates to be used in determining variable-rate premiums for premium payment years beginning between May 2003 and April 2004. Note that the required interest rate for premium payment years beginning in May through December 2003 were determined under the Job Creation and Worker Assistance Act of 2002, and that the required interest rate for premium payment years beginning in January through April 2004 were determined under the Pension Funding Equity Act of 2004.

| For premium payment years beginning in: | The required interest rate is: |
|---|--------------------------------|
| May 2003* .....                         | 4.90                           |
| June 2003* .....                        | 4.53                           |
| July 2003* .....                        | 4.37                           |
| August 2003* .....                      | 4.93                           |
| September 2003* .....                   | 5.31                           |
| October 2003* .....                     | 5.14                           |
| November 2003* .....                    | 5.16                           |
| December 2003* .....                    | 5.12                           |
| January 2004** .....                    | 4.94                           |
| February 2004** .....                   | 4.83                           |
| March 2004** .....                      | 4.79                           |
| April 2004** .....                      | 4.62                           |

\*The required interest rates for premium payment years beginning in May through December 2003 were determined under the Job Creation and Worker Assistance Act of 2002.

\*\*The required interest rates for premium payment years beginning in January through April 2004 were determined under the Pension Funding Equity Act of 2004.

Issued in Washington, DC, on this 13th day of April, 2004.

**Joseph H. Grant,**

*Deputy Executive Director and Chief Operating Officer, Pension Benefit Guaranty Corporation.*

[FR Doc. 04-8733 Filed 4-15-04; 8:45 am]

**BILLING CODE 7708-01-P**

## OFFICE OF PERSONNEL MANAGEMENT

### Submission for OMB Review; Comment Request for a New Information Collection: General Population Rental Equivalency Survey

**AGENCY:** Office of Personnel Management.

**ACTION:** Notice.

**SUMMARY:** Pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104-13, May 22, 1995), the Office of Personnel Management (OPM) has submitted to the Office of Management and Budget a request for a review of a new information collection. OPM plans to conduct a General Population Rental Equivalency Survey (GPRES) on a one-time basis to collect information on actual and estimated rents and rental characteristics from homeowners and renters in Alaska, Hawaii, Guam, Puerto Rico, the U.S. Virgin Islands, and the Washington, DC, area.

OPM will use this information to determine whether (1) differences between homeowner rent estimates and rental rates for comparable housing vary among the nonforeign cost-of-living allowance (COLA) areas and the Washington, DC, area; (2) rents vary among areas based on how long renters live in their rental units; and (3) rental data collected in GPRES differ on average from rental data that OPM collects in the COLA surveys. OPM regulations, adopted pursuant to the stipulation of settlement in *Caraballo v. United States*, No. 1997-0027 (D.V.I.), August 17, 2000, require the survey of rents and rental equivalence (homeowner estimates of the rental value of their homes).

OPM will collect information from approximately 5,000 to 8,000 respondents and estimates the total time per respondent will be 8 minutes, for a total burden of 670 to 1070 hours.

For copies of this proposal, contact Mary Beth Smith-Toomey on (202) 606-8358, fax: (202) 418-3251, or e-mail: [MaryBeth.Smith-Toomey@opm.gov](mailto:MaryBeth.Smith-Toomey@opm.gov). Please include a mailing address with your request.

**DATES:** Comments must be received on or before May 17, 2004.

**ADDRESSES:** Send or deliver comments to:

- Donald J. Winstead, Deputy Associate Director for Pay and Performance Policy, Office of Personnel Management, Room 7H31, 1900 E Street NW., Washington, DC 20415-8200; fax: (202) 606-4264; or e-mail: [cola@opm.gov](mailto:cola@opm.gov); and

- Joseph F. Lackey, OPM Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, NW., Room 10235, Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** Donald L. Paquin, (202) 606-2838.

U.S. Office of Personnel Management.

**Kay Coles James,**

*Director.*

[FR Doc. 04-8662 Filed 4-15-04; 8:45 am]

**BILLING CODE 6325-39-M**

## RAILROAD RETIREMENT BOARD

### Proposed Collection; Comment Request

**SUMMARY:** In accordance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 which provides opportunity for public comment on new or revised data collections, the Railroad Retirement Board (RRB) will publish periodic summaries of proposed data collections.

*Comments are invited on:* (a) Whether the proposed information collection is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (b) the accuracy of the RRB's estimate of the burden of the collection of the information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden related to the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

*Title and purpose of information collection:* Public Service Pension Questionnaires; OMB 3220-0136. Public Law 95-216 amended the Social Security Act of 1977 by providing, in part, that spouse or survivor benefits may be reduced when the beneficiary is in receipt of a pension based on employment with a Federal, State, or local governmental unit. Initially, the reduction was equal to the full amount of the government pension.

Public Law 98-21 changed the reduction to two-thirds of the amount of the government pension.

Public Law 108-203, the Social Security Protection Act of 2004, was

enacted on March 2, 2004. Section 418 of the Act changes the requirements a spouse or widow(er) who is employed by a Federal, State or local government must meet in order to be exempt from the public pension offset. Under the new provisions, if the application for railroad benefits is filed after March 2004 and the last day of public service is after June 30, 2004, FICA (Federal Insurance Contributions Act) taxes must have been deducted from the public service employment for the last 60 months of this employment. Previously, FICA taxes had to be deducted from the public service employment only on the person's last day of employment. A transition provision applies to these changes for workers whose last day of government employment occurs within five years after the March 2, 2004, date of enactment. For these workers, the requirement for 60 consecutive months of social security covered employment is shortened by the total number of months that the worker had in social security covered government service under the same retirement system before the date of enactment, but not to less than one month. If the 60-month period is shortened, the remaining months of service needed to fulfill the requirement must be performed after March 2, 2004, and in the last months of public service employment.

Sections 4(a)(1) and 4(f)(1) of the Railroad Retirement Act (RRA) provides that a spouse or survivor annuity should be equal in amount to what the annuitant would receive if entitled to a like benefit from the Social Security Administration. Therefore, the public service pension (PSP) provisions apply to RRA annuities.

RRB Regulations pertaining to the collection of evidence relating to public service pensions or worker's compensation paid to spouse or survivor applicants or annuitants are found in 20 CFR 219.64c.

The RRB utilizes Form G-208, Public Service Pension Questionnaire, and Form G-212, Public Service Monitoring Questionnaire, to obtain information used to determine whether an annuity reduction is in order. The RRB proposes to revise Form G-208 to add questions needed to determine if the public pension offset applies as well as minor non-burden impacting editorial changes. No changes are proposed to Form G-212.

Completion of the forms is voluntary. However, failure to complete the forms could result in the nonpayment of

benefits. One response is requested of each respondent. The completion time for the G-208 is estimated at 16 minutes and the G-212 is estimated at 15 minutes. The RRB estimates that approximately 70 Form G-208's and 1,100 Form G-212's are completed annually.

**FOR FURTHER INFORMATION CONTACT:** To request more information or to obtain a copy of the information collection justification, forms, and/or supporting material, please call the RRB Clearance Officer at (312) 751-3363 or send an e-mail request to [Charles.Mierzwa@RRB.GOV](mailto:Charles.Mierzwa@RRB.GOV). Comments regarding the information collection should be addressed to Ronald J. Hodapp, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois 60611-2092 or send an e-mail to [Ronald.Hodapp@RRB.GOV](mailto:Ronald.Hodapp@RRB.GOV). Written comments should be received within 60 days of this notice.

**Charles Mierzwa,**  
Clearance Officer.

[FR Doc. 04-8621 Filed 4-15-04; 8:45 am]

**BILLING CODE 7905-01-P**

## RAILROAD RETIREMENT BOARD

### Proposed Collection; Comment Request

**SUMMARY:** In accordance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 which provides opportunity for public comment on new or revised data collections, the Railroad Retirement Board (RRB) will publish periodic summaries of proposed data collections.

*Comments are invited on:* (a) Whether the proposed information collection is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (b) the accuracy of the RRB's estimate of the burden of the collection of the information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden related to the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

*Title and purpose of information collection:* Placement Service; OMB 3220-0057. Section 12(i) of the Railroad Unemployment Insurance Act (RUIA), authorizes the Railroad Retirement Board (RRB) to establish, maintain, and operate free employment offices to

provide claimants for unemployment benefits with job placement opportunities. Section 704(d) of the Regional Railroad Reorganization Act of 1973, as amended, and as extended by the consolidated Omnibus Budget Reconciliation Act of 1985, required the RRB to maintain and distribute a list of railroad job vacancies, by class and craft, based on information furnished by rail carriers to the RRB. Although this requirement under the law expired effective August 13, 1987, the RRB has continued to obtain this information in keeping with its employment service responsibilities under section 12(k) of the RUIA. Application procedures for the job placement program are prescribed in 20 CFR part 325. The procedures pertaining to the RRB's obtaining and distributing job vacancy reports furnished by rail carriers are described in 20 CFR 346.1.

The RRB currently utilizes four forms to obtain information needed to carry out its job placement responsibilities. Form ES-2, Supplemental Information for Central Register, is used by the RRB to obtain information needed to update a computerized central register of separated and furloughed railroad employees available for employment in the railroad industry. Form ES-21, Referral to State Employment Service, and ES-21c, Report of State Employment Service Office, are used by the RRB to provide placement assistance for unemployed railroad employees through arrangements with State Employment Service offices. Form UI-35, Field Office Record of Claimant Interview, is used primarily by RRB field office staff to conduct in-person interviews of claimants for unemployment benefits. Completion of these forms is required to obtain or maintain a benefit. In addition, the RRB also collects Railroad Job Vacancies information received voluntarily from railroad employers.

The RRB proposes minor, non-burden impacting, editorial changes to Forms ES-21, reformatting changes to Form ES-21c and minor editorial and reformatting changes to Form UI-35. Minor non-burden impacting changes are being proposed to the Railroad Job Vacancies Report portion of the information collection. The RRB proposes no changes to Form ES-2.

### Estimate of Annual Respondent Burden

The estimated annual respondent burden for this collection is as follows:

| Form #(s)                           | Annual responses | Completion time (min) | Burden (hrs) |
|-------------------------------------|------------------|-----------------------|--------------|
| ES-2 .....                          | 7,500            | 0.25                  | 31           |
| ES-21 .....                         | 3,500            | 0.68                  | 40           |
| ES-21c .....                        | 1,250            | 1.50                  | 31           |
| UI-35 (in-person) .....             | 9,000            | 7.00                  | 1,050        |
| UI-35 (by mail) .....               | 1,000            | 10.50                 | 175          |
| Railroad Job Vacancies Report ..... | 750              | 10.00                 | 125          |
| Total .....                         | 23,000           | .....                 | 1,452        |

**FOR FURTHER INFORMATION CONTACT:** To request more information or to obtain a copy of the information collection justification, forms, and/or supporting material, please call the RRB Clearance Officer at (312) 751-3363 or send an e-mail request to [Charles.Mierzwa@RRB.GOV](mailto:Charles.Mierzwa@RRB.GOV). Comments regarding the information collection should be addressed to Ronald J. Hodapp, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois 60611-2092 or send an e-mail to [Ronald.Hodapp@RRB.GOV](mailto:Ronald.Hodapp@RRB.GOV). Written comments should be received within 60 days of this notice.

**Charles Mierzwa,**  
Clearance Officer.

[FR Doc. 04-8623 Filed 4-15-04; 8:45 am]

BILLING CODE 7905-01-P

## SECURITIES AND EXCHANGE COMMISSION

### Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94-409, that the Securities and Exchange Commission will hold the following meetings during the week of April 19, 2004: A closed meeting will be held on Tuesday, April 20, 2004, at 2 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552(b)(5), (6), (7), (9), and (10) and 17 CFR 200.402(a)(5), (6), (7), 9(ii), and (10), permit consideration of the scheduled matters at the closed meeting.

Commissioner Atkins, as duty officer, voted to consider the items listed for the closed meeting in a closed session.

The subject matter of the closed meeting scheduled for Tuesday, April 20, 2004, will be:

Formal orders of investigation;

Institution and settlement of injunctive actions; and

Institution and settlement of administrative proceedings of an enforcement nature.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: The Office of the Secretary at (202) 942-7070.

Dated: April 13, 2004.

**Jonathan G. Katz,**  
Secretary.

[FR Doc. 04-8767 Filed 4-14-04; 11:53 am]

BILLING CODE 8010-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49555; File No. SR-CBOE-2003-59]

### Self-Regulatory Organizations; Chicago Board Options Exchange, Inc.; Order Granting Approval to Proposed Rule Change and Amendment No. 1 Thereto Relating to the Exchange's Obvious Error Rule

April 12, 2004.

On December 22, 2003, the Chicago Board Options Exchange, Inc. ("CBOE") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend CBOE Rule 6.25, which governs the nullification and adjustment of electronic transactions resulting from obvious error. On January 20, 2004, CBOE submitted Amendment No. 1 to the proposed rule change.<sup>3</sup> The proposed rule change, as amended, was published for comment in the **Federal Register** on February 12, 2004.<sup>4</sup> The

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See letter from Steve Youhn, Legal Division, CBOE, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, dated January 16, 2004.

<sup>4</sup> See Securities Exchange Act Release No. 49194 (February 5, 2004), 69 FR 7058.

Commission received no comments on the proposal.

The Exchange proposes to extend specified provisions of its obvious error rule to open outcry transactions. Specifically, CBOE proposes to extend the application of CBOE Rule 6.25(a)(3) (Verifiable Disruptions or Malfunctions of Exchange Systems), CBOE Rule 6.25(a)(4) (Erroneous Print in the Underlying), and CBOE Rule 6.25 (a)(5) (Erroneous Quote in the Underlying) to open outcry trades. CBOE also proposes that paragraphs (b) through (e) of CBOE Rule 6.25, which set forth the procedures for review, adjustment/nullification, and appeal of obvious error electronic transactions, apply to the adjustment and nullification of open outcry transactions in the same manner that they apply to electronic transactions.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange<sup>5</sup> and, in particular, the requirements of Section 6(b) of the Act<sup>6</sup> and the rules and regulations thereunder. The Commission finds that the proposed rule change is consistent with Section 6(b)(5)<sup>7</sup> of the Act, which requires that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission considers that in most circumstances trades that are executed between parties should be honored. On rare occasions, the price of the executed trade indicates an "obvious error" may exist, suggesting that it is unrealistic to expect that the parties to the trade had come to a meeting of the

<sup>5</sup> In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>6</sup> 15 U.S.C. 78f(b).

<sup>7</sup> 15 U.S.C. 78f(b)(5).

minds regarding the terms of the transaction. In the Commission's view, the determination of whether an "obvious error" has occurred should be based on specific and objective criteria and subject to specific and objective procedures. CBOE's proposal extends the application of three provisions of its current obvious error rule covering electronic transactions to open outcry transactions. These provisions are Verifiable Disruptions or Malfunctions of Exchange Systems, Erroneous Prints in the Underlying, and Erroneous Quotes in the Underlying. The determination of whether an obvious error exists for open outcry transactions for these three situations is based on the same specific and objective criteria that currently exist for electronic transactions. Also, the procedures governing the adjustment or nullification of Verifiable Disruptions or Malfunctions of Exchange Systems, Erroneous Prints in the Underlying, and Erroneous Quotes in the Underlying in open outcry transactions are the same specific and objective procedures the Exchange has in place for adjustment or nullification of these same situations in electronic transactions.<sup>8</sup>

It is therefore ordered, pursuant to Section 19(b)(2) of the Act<sup>9</sup>, that the proposed rule change (File No. SR-CBOE-2003-59), as amended, be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>10</sup>

**Margaret H. McFarland,**  
Deputy Secretary.

[FR Doc. 04-8661 Filed 4-15-04; 8:45 am]

BILLING CODE 8010-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49554; File No. SR-OCC-2004-05]

### Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Modifying the Definition of "Premium" With Respect to Foreign Currency and Cross-Rate Currency Options

April 12, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> notice is hereby given that on

March 19, 2004, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change described in items I, II, and III below, which items have been prepared primarily by OCC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The purpose of the proposed rule change is to amend OCC's By-Laws and Rules to modify the definition of "premium" with respect to foreign currency and cross-rate currency options.

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in item IV below. OCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.<sup>2</sup>

##### (A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

###### Background

OCC's By-Laws and Rules currently define "premium" for foreign currency options and cross-rate foreign currency options with reference to units of the relevant trading currency. "Trading currency" is defined in Article I of OCC's By-Laws as "the currency in which premium and/or exercise prices are denominated for a class of foreign currency options or cross-rate foreign currency options." Normally, premium and exercise prices are expressed in the same currency. However, the Philadelphia Stock Exchange ("Phlx"), which trades both foreign currency options and cross-rate foreign currency options, permits premiums to be quoted both in units of the trading currency and as a percentage of the underlying currency.<sup>3</sup>

Presently, the method of quoting premiums as a percentage of the underlying currency occurs only with "flexibly structured options" as defined in Article I of the By-Laws ("flex options"). Nevertheless, OCC wishes to amend the relevant definitions of "premium" in order to make clear that quotation of premiums as a percentage of an underlying foreign currency will be permitted with foreign currency options and cross-rate options in addition to flex options.

###### Proposed Rule Changes

As noted above, "Trading Currency" is presently defined to mean "the currency in which premiums and/or exercise prices are denominated for a class of foreign currency options or cross-rate foreign currency options." OCC proposes to expand the meaning of the term where, as described above, the premium is quoted in the underlying currency and the exercise price is quoted in a different currency. Generally, the context in which the term "Trading Currency" is used will dictate whether it is a reference to the premium currency or the currency in which the exercise price is denominated (the "exercise currency"). Where the context is unclear, OCC is proposing to insert parenthetical language to expressly state which reference is intended. For this purpose, changes are proposed in the introduction to Article XV of the By-Laws and Chapter XVI of the Rules and to the definitions of "Class of Options" and "Settlement Time" in both Article XV and Article XX of the By-Laws.

OCC proposes to amend the definitions of "Premium" in Article XV, "Foreign Currency Options" and Article XX, "Cross-Rate Foreign Currency Options" by adding a new sentence to each to make clear that such premiums may be quoted as a percentage of the relevant underlying currency to the extent permitted under SEC rules. The definitions have also been amended to expressly provide that premiums quoted in units of a trading currency may be quoted in any of (a) fractions, (b) decimals, or (c) multiples of units of the relevant trading currency. Further, OCC proposes to correct an inconsistency between the current Article XX definition of "premium," which

euro (a quote of 2.05 = EUR.0205 x 62,500 = EUR 1281.25). When premiums are quoted as a percentage of the underlying currency, premiums are also paid in the underlying currency. In that case, for purposes of premium quotation and settlement only, the "trading currency" is the same as the underlying currency (EUR in the above example). Nevertheless, the exercise price for such options would continue to be stated in terms of a trading currency other than the underlying currency (USD, in the example).

<sup>8</sup> See Securities Exchange Act Release No. 48827 (November 24, 2003), 68 FR 67498 (December 2, 2003) (File No. SR-CBOE-2001-04).

<sup>9</sup> 15 U.S.C. 78s(b)(2).

<sup>10</sup> 17 CFR 200.30-3(a)(12).

<sup>11</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> The Commission has modified the text of the summaries prepared by OCC.

<sup>3</sup> For example, the premium of a USD/EUR contract could be expressed in U.S. cents per euro (a quote of 1.05 = \$.0105 x 62,500 (the standard EUR contract size) = \$656.25), or as a percentage of

specifically mentions multiples and fractions of the unit of trading currency and the current Article XV definition of "premium" which is silent on the point.

*(B) Self-Regulatory Organization's Statement on Burden on Competition*

OCC does not believe that the proposed rule change would impose any burden on competition.

*(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

Written comments were not and are not intended to be solicited with respect to the proposed rule change, and none have been received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective upon filing pursuant to section 19(b)(3)(A)(iii) of the Act<sup>4</sup> and Rule 19b-4(f)(4)<sup>5</sup> thereunder because the proposed rule effects a change in an existing service of OCC that does not adversely affect the safeguarding of securities or funds in the custody or control of OCC or for which OCC is responsible and does not significantly affect the respective rights or obligations of OCC or persons using the service. At any time within 60 days of the filing of such rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Comments may also be submitted electronically at the following e-mail address: [rule-comments@sec.gov](mailto:rule-comments@sec.gov). All comment letters should refer to File No. SR-OCC-2004-05. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in either hardcopy or by e-mail but not by both methods. Copies

of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549-0609. Copies of such filing also will be available for inspection and copying at the principal office of OCC and on OCC's Web site at <http://www.optionsclearing.com>. All submissions should refer to File No. SR-OCC-2004-05 and should be submitted by May 7, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>6</sup>

**Margaret H. McFarland,**  
Deputy Secretary.

[FR Doc. 04-8620 Filed 4-15-04; 8:45 am]

**BILLING CODE 8010-01-P**

**SMALL BUSINESS ADMINISTRATION**

**[Declaration of Disaster #3569]**

**State of Mississippi**

Lamar and Marion Counties and the contiguous counties of Covington, Forrest, Jefferson Davis, Lawrence, Pearl River and Walthall in the State of Mississippi; and Washington Parish in the State of Louisiana constitute a disaster area due to damages caused by earthen dam failure that occurred on March 12, 2004. Applications for loans for physical damage as a result of this disaster may be filed until the close of business on June 8, 2004, and for economic injury until the close of business on January 10, 2005, at the address listed below or other locally announced locations: U.S. Small Business Administration, Disaster Area 2 Office, One Baltimore Place, Suite 300, Atlanta, GA 30308.

The interest rates are:

|   | Percent |
|---|---------|
| <i>For Physical Damage:</i>                         |         |
| Homeowners with credit available elsewhere .....    | 6.125   |
| Homeowners without credit available elsewhere ..... | 3.125   |
| Businesses with credit available elsewhere .....    | 5.800   |

<sup>6</sup> 17 CFR 200.30-3(a)(12).

|   | Percent |
|---|---------|
| Businesses and non-profit organizations without credit available elsewhere .....        | 2.900   |
| Others (including non-profit organizations) with credit available elsewhere .....       | 4.875   |
|   |         |
|   | Percent |
| <i>For Economic Injury:</i>   |         |
| Businesses and small agricultural cooperatives without credit available elsewhere ..... | 2.900   |

The number assigned to this disaster for physical damage is 356906 for Mississippi and 357006 for Louisiana. The number assigned to this disaster for economic injury is 9Z8900 for Mississippi and 9Z9000 for Louisiana.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008.)

Dated: April 9, 2004.

**Hector V. Barreto,**  
Administrator.

[FR Doc. 04-8608 Filed 4-15-04; 8:45 am]

**BILLING CODE 8025-01-P**

**DEPARTMENT OF STATE**

**Overseas Buildings Operations; Industry Advisory Panel: Meeting Notice**

[Public Notice 4644]

The Industry Advisory Panel of Overseas Buildings Operations will meet on Thursday, April 22, 2004 from 9:45 until 11:45 a.m. and reconvene at 1 until 3:30 p.m. Eastern Standard Time. The meeting will be held in conference room 1105 at the Department of State, 2201 C Street NW (entrance on 23rd Street), Washington, DC. The purpose of the meeting is to discuss new technologies and successful management practices for design, construction, security, property management, emergency operations, the environment, and planning and development. An agenda will be available prior to the meeting.

The meeting will be open to the public, however, seating is limited. Prior notification and a valid photo ID are mandatory for entry into the building. Members of the public who plan to attend must notify Luigina Pinzino at 703/875-7109 before, Tuesday, April 20th, to provide date of birth, Social Security number, and telephone number.

**FOR FURTHER INFORMATION CONTACT:**  
Luigina Pinzino 703/875-7109.

<sup>4</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>5</sup> 17 CFR 240.10b-1(f)(4)

Dated: March 31, 2004.

**Charles E. Williams,**

*Director/Chief Operating Officer, Overseas Buildings Operations, Department of State.*  
[FR Doc. 04-8826 Filed 4-15-04; 8:45 am]

BILLING CODE 4710-24-U

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### Environmental Assessment for the Air Tour Management Plan Program at Badlands National Park

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Notice of intent to prepare an environmental assessment and notice of initiation of public scoping.

**SUMMARY:** The Federal Aviation Administration (FAA), in cooperation with the National Park Service (NPS), has initiated the development of an Air Tour Management Plan (ATMP) for Badlands National Park, pursuant to the National Parks Air Tour Management Act of 2000 (Public Law 106-181) and its implementing regulations contained in Title 14, Code of Federal Regulations, Part 136, National Parks Air Tour Management. The objective of each ATMP is to develop acceptable and effective measures to mitigate or prevent

the significant adverse impacts, if any, of commercial air tour operations upon the natural and cultural resources, visitor experiences, and tribal lands of the subject national park unit.

#### DATES:

**Scoping Period:** The 45-day scoping period will be initiated upon publication of this notice. Please submit any written response you may have within 45 days from the date of this Notice, or no later than June 1, 2004.

**Scoping Meeting:** A combined public scoping meeting has been scheduled for the Badlands National Park ATMP and the Mount Rushmore National Memorial ATMP as follows:

| Subject park                           | Date                       | Time        | Location  |
|--|----------------------------|-------------|---|
| Badlands National Park .....           | Tuesday, May 4, 2004 ..... | 6 p.m. .... | Holiday Inn Rapid City-Rushmore Plaza, Hammons Conference Room, 505 N Fifth Street, Rapid City, South Dakota. |
| Mount Rushmore National Memorial ..... | Tuesday May 4, 2004 .....  | 6 p.m. .... | Holiday Inn Rapid City-Rushmore Plaza, Hammons Conference Room, 505 N Fifth Street, Rapid City, South Dakota. |

**ADDRESSES:** Please submit any written response you may have within 45 days from the date of this Notice, or no later than June 1, 2004. Address your comments for Badlands National Park to: Docket Management System, Doc No. FAA-2004-17458, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590-0001.

You must identify the docket number FAA-2004-17458 for Badlands National Park at the beginning of your comments. If you wish to receive confirmation that FAA received your comments, include a self-addressed, stamped postcard. You may also submit comments through the Internet to <http://dms.dot.gov>. You may review the public docket containing comments in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Dockets Office is on the plaza level of the NASSIF Building at the Department of Transportation at the above address. Also, you may review public dockets on the Internet at <http://dms.dot.gov>. Additionally, comments will be received and recorded at the public scoping meetings. Please note that names and addresses of people who comment become part of the public record. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. We will make all submissions from organizations, businesses, and from individuals identifying themselves as representatives or officials of

organizations or businesses available for public inspection in their entirety.

#### FOR FURTHER INFORMATION CONTACT:

Steve May, Air Tour Management Plan Program Manager, Executive Resource Staff, AWP-4, Federal Aviation Administration, Western-Pacific Region. Mailing address: P.O. Box 92007, Los Angeles, California 90009-2007. Telephone: (310) 725-3808. Street address: 15000 Aviation Boulevard, Lawndale, California 90261. E-mail: [Steve.May@faa.gov](mailto:Steve.May@faa.gov).

**SUPPLEMENTARY INFORMATION:** In developing each ATMP and any associated rulemaking actions, the FAA is required to comply with the National Environmental Policy Act of 1969, which calls on Federal agencies to consider environmental issues as part of their decision making process. For the purposes of compliance with the National Environmental Policy Act, the FAA is the Lead Agency and the NPS is a Cooperating Agency. The FAA Air Tour Management Plan Program Office and the NPS Natural Sounds Program Office are responsible for the overall implementation of the ATMP Program.

An Environmental Assessment is being prepared in accordance with FAA Order 1050.1D, Policies and Procedures for Considering Environmental Impacts. The FAA is now inviting the public, agencies, tribes, and other interested parties to provide comments, suggestions, and input regarding: (1) The scope, issues, and concerns related to the development of each ATMP; (2) the scope of issues and the

identification of significant issues regarding commercial air tours and their potential impacts to be addressed in the environmental process; (3) the potential effects of commercial air tours on cultural and historic resources; (4) past, present, and reasonably foreseeable future actions which, when considered with ATMP alternatives, may result in significant cumulative impacts; (5) potential ATMP alternatives; and (6) the potential impacts on natural resources and visitor experiences. The FAA requests that comments be as specific as possible in response to actions that are being proposed under this notice.

A combined public scoping meeting has been scheduled for the Badlands National Park ATMP and the Mount Rushmore National Memorial ATMP. The purpose of this scoping meeting is to describe the ATMP development and environmental processes, obtain public input regarding the ATMP and potential environmental concerns that may be appropriate for consideration in the Environmental Assessment, and to identify alternatives to be considered. Both oral and written comments will be accepted during this meeting. Agency personnel will be available to record your spoken comments. All recorded and written comments become part of the official record. The public scoping meeting will consist of a presentation in which the National Parks Air Tour Management Act of 2000 is introduced, existing conditions at Badlands National Park and Mount Rushmore National Memorial will be described and the

ATMP development process at each park unit will be explained. Following the presentation, the floor will be opened for public comments to be received.

Park-specific scoping documents that describe the project in greater detail are available at the following locations:

- Rapid City Public Library, 610 Quincy Street, Rapid City, South Dakota
- Oglala Lakota College Library, 3 Mile Creek Road, Kyle, South Dakota
- Keystone Town Library, 1101 Madill Street, Keystone, South Dakota
- E. Y. Berry Library, Black Hills State University, 1200 University, Spearfish, South Dakota
- South Dakota State Library, Mercedes MacKay Building, 800 Governors Drive, Pierre, South Dakota
- FAA Air Tour Management Plan Program Web site, <http://www.atmp.faa.gov/>
- FAA Docket Management System Web site, <http://dms.dot.gov>

Issued in Hawthorne, California on April 8, 2004.

**Steve May,**

*Program Manager, Air Tour Management Plan (ATMP) Program.*

[FR Doc. 04-8714 Filed 4-15-04; 8:45 am]

**BILLING CODE 4910-13-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### Environmental Assessment for the Air Tour Management Plan Program at Lake Mead National Recreation Area

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Notice of intent to prepare an environmental assessment and notice of initiation of public scoping.

**SUMMARY:** The Federal Aviation Administration (FAA), in cooperation with the National Park Service (NPS),

has initiated the development of an Air Tour Management Plan (ATMP) for Lake Mead National Recreation Area, pursuant to the National Parks Air Tour Management Act of 2000 (Public Law 106-181) and its implementing regulations contained in Title 14, Code of Federal Regulations, Part 136, National Parks Air Tour Management. The objective of the ATMP is to develop acceptable and effective measures to mitigate or prevent the significant adverse impacts, if any, of commercial air tour operations upon the natural and cultural resources, visitor experiences, and tribal lands of the subject national park unit.

**DATES:** *Scoping Period:* The 45-day scoping period will begin on April 16, 2004 and will close May 31, 2004. Please submit any written response you may have no later than May 31, 2004.

*Scoping Meeting:* A public scoping meeting has been scheduled for this project as follows:

| Subject park                        | Date                          | Time        | Location  |
|-------------------------------------|-------------------------------|-------------|---|
| Lake Mead National Recreation Area. | Tuesday, April 27, 2004 ..... | 6 p.m. .... | Henderson Convention Center, 200 S. Water St., Henderson, NV 89015. |

**ADDRESSES:** Please submit any written response no later than May 31, 2004. Address your comments to: Docket Management System, Doc No. FAA-2004-17460, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590-0001.

You must identify the docket number FAA-2004-17460 for Lake Mead National Recreation Area at the beginning of your comments. If you wish to receive confirmation that FAA received your comments, include a self-addressed, stamped postcard. You may also submit comments through the Internet to <http://dms.dot.gov>. You may review the public docket containing comments in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Dockets Office is on the plaza level of the NASSIF Building at the Department of Transportation at the above address. Also, you may review public dockets on the Internet at <http://dms.dot.gov>. Additionally, comments will be received and recorded at the public scoping meeting. Please note that names and addresses of people who comment become part of the public record. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. We will make all submissions from organizations,

businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses available for public inspection in their entirety.

#### FOR FURTHER INFORMATION CONTACT:

Brian Armstrong, Air Tour Management Plan Program Manager, Executive Resource Staff, AWP-4, Federal Aviation Administration, Western-Pacific Region. Mailing address: P.O. Box 92007, Los Angeles, California 90009-2007. Telephone: (310) 725-3818. Street address: 15000 Aviation Boulevard, Lawndale, California 90261. E-mail: [Brian.Armstrong@faa.gov](mailto:Brian.Armstrong@faa.gov).

**SUPPLEMENTARY INFORMATION:** In developing the ATMP and any associated rulemaking actions, the FAA is required to comply with the National Environmental Policy Act of 1969, which calls on Federal agencies to consider environmental issues as part of their decision making process. For the purposes of compliance with the National Environmental Policy Act, the FAA is the Lead Agency and the NPS is a Cooperating Agency. The FAA Air Tour Management Plan Program Office and the NPS Natural Sounds Program Office are responsible for the overall implementation of the ATMP Program.

Environmental Assessments are being prepared in accordance with FAA Order 1050.1D, Policies and Procedures for Considering Environmental Impacts.

The FAA is now inviting the public, agencies, tribes, and other interested parties to provide comments, suggestions, and input regarding: (1) The scope, issues, and concerns related to the development of each ATMP; (2) the scope of issues and the identification of significant issues regarding commercial air tours and their potential impacts to be addressed in the environmental process; (3) the potential effects of commercial air tours on cultural and historic resources; (4) past, present, and reasonably foreseeable future actions which, when considered with ATMP alternatives, may result in significant cumulative impacts; (5) potential ATMP alternatives; and (6) the potential impacts on natural resources and visitor experiences. The FAA requests that comments be as specific as possible in response to actions that are being proposed under this notice.

A public scoping meeting has been scheduled for this project. The purpose of this scoping meeting is to describe the ATMP development and environmental processes, obtain public input regarding the ATMP and potential environmental concerns that may be appropriate for consideration in the Environmental Assessment, and to identify alternatives to be considered. Both oral and written comments will be accepted during this meeting. Agency personnel will be available to record

your spoken comments. All recorded and written comments become part of the official record. The public scoping meeting will consist of a presentation in which the National Parks Air Tour Management Act of 2000 is introduced, existing conditions at Lake Mead National Recreation Area will be described and the ATMP development process at the park unit will be explained. Following the presentation, the floor will be opened for public comments to be received.

Park-specific scoping documents that describe the project in greater detail are available at the following locations:

- Green Valley Library, 2797 N. Green Valley Parkway, Henderson, NV
- Laughlin Library, 2840 South Needles Highway, Laughline, NV
- Las Vegas Library, 833 Las Vegas Boulevard North, Las Vegas, NV
- Boulder City Library, 701 Adams, Boulder City, NV
- Henderson District James I. Gibson Library, 280 S. Water Street, Henderson, NV
- North Las Vegas Library, 2300 Civic Center Drive, North Las Vegas, NV
- Valle Vista Library, 7193 Concho Drive, Kingman, UT
- St. George Public Library, 50 S. Main Street, St. George, UT
- Moapa Valley Library, 350 North Moapa Valley Boulevard, Overton, NV

- Mojave Community College, 1971 Jagerson Avenue, Kingman, AZ
- Bullhead Public Library, 1170 Hancock Road, Bullhead City, AZ
- Phoenix Reference Library, 411 North Central Avenue, Phoenix, AZ
- Cedar City Public Library, 303 North 100 East, Cedar City, UT
- Hurricane City Library, 36 South 300 West, Hurricane, UT
- FAA Air Tour Management Plan Program Web site, <http://www.atmp.faa.gov/>
- FAA Docket Management System Web site, <http://dms.dot.gov>

Issued in Hawthorne, CA on April 8, 2004.

**Brian Q. Armstrong,**

*Air Tour Management Plan, Program Manager, AWP-4.*

[FR Doc. 04-8713 Filed 4-15-04; 8:45 am]

**BILLING CODE 4910-13-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### Environmental Assessment for the Air Tour Management Plan Program at Mount Rushmore National Memorial

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Notice of intent to prepare an environmental assessment and notice of initiation of public scoping.

**SUMMARY:** The Federal Aviation Administration (FAA), in cooperation with the National Park Service (NPS), has initiated the development of an Air Tour Management Plan (ATMP) for Mount Rushmore National Memorial, pursuant to the National Parks Air Tour Management Act of 2000 (Public Law 106-181) and its implementing regulations contained in Title 14, Code of Federal Regulations, Part 136, National Parks Air Tour Management. The objective of each ATMP is to develop acceptable and effective measures to mitigate or prevent the significant adverse impacts, if any, of commercial air tour operations upon the natural and cultural resources, visitor experiences, and tribal lands of the subject national park unit.

#### DATES:

**Scoping Period:** The 45-day scoping period will be initiated upon publication of this notice. Please submit any written response you may have within 45 days from the date of this Notice, or no later than June 1, 2004.

**Scoping Meeting:** A combined public scoping meeting has been scheduled for the Badlands National Park ATMP and the Mount Rushmore National Memorial ATMP as follows:

| Subject park                      | Date                       | Time        | Location  |
|-----------------------------------|----------------------------|-------------|---|
| Badlands National Park .....      | Tuesday, May 4, 2004 ..... | 6 p.m. .... | Holiday Inn Rapid City-Rushmore Plaza, Hammons Conference Room, 505 N Fifth Street, Rapid City, South Dakota. |
| Mount Rushmore National Memorial. | Tuesday, May 4, 2004 ..... | 6 p.m. .... | Holiday Inn Rapid City-Rushmore Plaza, Hammons Conference Room, 505 N Fifth Street, Rapid City, South Dakota. |

**ADDRESSES:** Please submit any written response you may have within 45 days from the date of this Notice, or no later than June 1, 2004. Address your comments for Mount Rushmore National Memorial to: Docket Management System, Doc No. FAA-2004-17459, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590-0001.

You must identify the docket number FAA-2004-17459 for Mount Rushmore National Memorial at the beginning of your comments. If you wish to receive confirmation that FAA received your comments, include a self-addressed, stamped postcard. You may also submit comments through the Internet to <http://dms.dot.gov>. You may review the public docket containing comments in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The

Dockets Office is on the plaza level of the NASSIF Building at the Department of Transportation at the above address. Also, you may review public dockets on the Internet at <http://dms.dot.gov>. Additionally, comments will be received and recorded at the public scoping meetings. Please note that names and addresses of people who comment become part of the public record. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. We will make all submissions from organizations, businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses available for public inspection in their entirety.

**FOR FURTHER INFORMATION CONTACT:** Steve May, Air Tour Management Plan Program Manager, Executive Resource Staff, AWP-4, Federal Aviation

Administration, Western-Pacific Region. Mailing address: P.O. Box 92007, Los Angeles, California 90009-2007. Telephone: (310) 725-3808. Street address: 15000 Aviation Boulevard, Lawndale, California 90261. E-mail: [Steve.May@faa.gov](mailto:Steve.May@faa.gov)

**SUPPLEMENTARY INFORMATION:** In developing each ATMP and any associated rulemaking actions, the FAA is required to comply with the National Environmental Policy Act of 1969, which calls on Federal agencies to consider environmental issues as part of their decision making process. For the purposes of compliance with the National Environmental Policy Act, the FAA is the Lead Agency and the NPS is a Cooperating Agency. The FAA Air Tour Management Plan Program Office and the NPS Natural Sounds Program Office are responsible for the overall implementation of the ATMP Program.

An Environmental Assessment is being prepared in accordance with FAA Order 1050.1D, Policies and Procedures for Considering Environmental Impacts. The FAA is now inviting the public, agencies, tribes, and other interested parties to provide comments, suggestions, and input regarding: (1) The scope, issues, and concerns related to the development of each ATMP; (2) the scope of issues and the identification of significant issues regarding commercial air tours and their potential impacts to be addressed in the environmental process; (3) the potential effects of commercial air tours on cultural and historic resources; (4) past, present, and reasonably foreseeable future actions which, when considered with ATMP alternatives, may result in significant cumulative impacts; (5) potential ATMP alternatives; and (6) the potential impacts on natural resources and visitor experiences. The FAA requests that comments be as specific as possible in response to actions that are being proposed under this notice.

A combined public scoping meeting has been scheduled for the Badlands National Park ATMP and the Mount Rushmore National Memorial ATMP. The purpose of this scoping meeting is to describe the ATMP development and environmental processes, obtain public input regarding the ATMP and potential environmental concerns that may be appropriate for consideration in the Environmental Assessment, and to identify alternatives to be considered. Both oral and written comments will be accepted during this meeting. Agency personnel will be available to record your spoken comments. All recorded and written comments become part of the official record. The public scoping meeting will consist of a presentation in which the National Parks Air Tour Management Act of 2000 is introduced, existing conditions at Badlands National Park and Mount Rushmore National Memorial will be described and the ATMP development process at each park unit will be explained. Following the presentation, the floor will be opened for public comments to be received.

Park-specific scoping documents that describe the project in greater detail are available at the following locations:

- Rapid City Public Library, 610 Quincy Street, Rapid City, South Dakota
- Oglala Lakota College Library, 3 Mile Creek Road, Kyle, South Dakota
- Keystone Town Library, 1101 Madill Street, Keystone, South Dakota
- E. Y. Berry Library, Black Hills State University, 1200 University, Spearfish, South Dakota

- South Dakota State Library, Mercedes MacKay Building, 800 Governors Drive, Pierre, South Dakota
- FAA Air Tour Management Plan Program Web site, <http://www.atmp.faa.gov/>
- FAA Docket Management System Web site, <http://dms.dot.gov>

Issued in Hawthorne, California on April 8, 2004.

**Steve May,**

*Program Manager, Air Tour Management Plan (ATMP) Program.*

[FR Doc. 04-8715 Filed 4-15-04; 8:45 am]

**BILLING CODE 4910-13-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

#### Environmental Impact Statement: Fairbanks, AK

**AGENCY:** Federal Highway Administration (FHWA), and Alaska Department of Transportation and Public Facilities (ADOT&PF).

**ACTION:** Notice of intent.

**SUMMARY:** The FHWA is issuing this notice to advise the public that a Supplemental Environmental Impact Statement will be prepared for a proposed transportation improvement project on University Avenue in Fairbanks, Alaska.

**FOR FURTHER INFORMATION CONTACT:** Edrie Vinson, Environmental Project Manager, Federal Highway Administration, Alaska Division Office, 709 W. 9th Street, Room 851, P.O. Box 21648, Juneau, Alaska 99802-1648. Telephone (907) 586-7464. Janet Brown, P.E., Project Manager, Alaska Department of Transportation and Public Facilities, Preliminary Design & Environmental, 2301 Peger Road, Fairbanks, Alaska 99709-5399. Telephone (907) 451-2283.

**SUPPLEMENTARY INFORMATION:** An Environmental Impact Statement (EIS) to rehabilitate and widen University Avenue was prepared in July 1988, a Final EIS (FEIS) was approved June 30, 1991, and the FHWA issued a Record of Decision (ROD) in August of 1991.

The Selected Alternative in the ROD would reconstruct University Avenue in Fairbanks, Alaska between the Mitchell Expressway and Thomas Street, a distance of 21 miles. University Avenue was to be reconstructed with a two-way center turn lane (16-foot wide) over much of the alignment. A raised center meridian with left turn pockets was designed for 33% of the roadway. This alternative included 8-foot shoulders with a combined 10-foot wide

pedestrian/bike path on the west and a 5-foot wide sidewalk on the east of University Avenue. The Chena River Bridge widening was a rehabilitation of the existing structure. The Geraghty Avenue intersection was to be moved 150-feet north, to provide a greater separation from the intersection with Airport Way.

The project as approved was never built. Since that time the ADOT&PF has determined to maximize the use of existing right-of-way, and reduce environmental impacts by minimizing the total project footprint. Safety would be improved by reducing direct access to some locations along University. Such changes to the project require the preparation of a Supplemental EIS. These proposed changes include a continuous raised meridian over 89% of the roadway with left turn lanes only at the 12 intersections; narrowing the pedestrian/bike path to 8 feet in width; replacing the Chena River Bridge; and constructing a grade separated Alaska Railroad crossing over University Avenue. Elevating the railroad would require the closing of the Fairbanks Street entrance to the University of Alaska Fairbanks and replacement with a pedestrian/bike path and tunnel under the railroad. Additional improvements proposed include making Geraghty Avenue a right turn in and right turn out intersection in its current location and the Airport Avenue frontage road would end in a cul-de-sac. Halvorson Road would be extended 720 feet northward to Wolf Run and Indiana Avenue would be relocated 160 feet to the south. Intersection improvements would be added at Airport Way and Geist Road/Johansen Expressway.

The Supplemental EIS will update the analyses of all the reasonable alternatives evaluated in the FEIS, including the alternative previously identified as the Preferred Alternative.

Announcements describing the SEIS process and requesting comments will be sent to appropriate Federal, State, and local agencies, and to private organizations and citizens who have previously expressed or are known to have interest in this proposal. Public notices will also be published in local newspapers. Public and agency scoping meetings will be announced and held in Fairbanks, Alaska. A public hearing will be held after approval of the SEIS. Public notice will be given of the time and place of the hearing. The SEIS will be available for public and agency review and comment prior to the hearing.

To ensure that the full range of issues related to this proposed action are addressed and all significant issues

identified, written public input, comments and suggestions on environmental issues or concerns related to the proposed improvements are invited from all interested parties. Comments should be submitted to the Federal Highway Administration or the Alaska Department of Transportation and Public Facilities at the addresses provided above by May 30, 2004.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Research, Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Issued on: April 8, 2004.

**Karen A. Schmidt,**

*Assistant Division Administrator.*

[FR Doc. 04-8607 Filed 4-15-04; 8:45 am]

**BILLING CODE 4910-22-M**

## DEPARTMENT OF TRANSPORTATION

### Maritime Administration

[Docket No. MARAD 2004 17531]

#### Information Collection Available for Public Comments and Recommendations

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice announces the Maritime Administration's (MARAD's) intentions to request extension of approval for three years of a currently approved information collection.

**DATES:** Comments should be submitted on or before June 15, 2004.

**FOR FURTHER INFORMATION CONTACT:** Joe Strassburg, Maritime Administration, 400 Seventh St., SW., Washington, DC 20590. Telephone: (202) 366-4156; fax: (202) 366-7901; or e-mail: [joe.strassburg@marad.dot.gov](mailto:joe.strassburg@marad.dot.gov). Copies of this collection also can be obtained from that office.

#### SUPPLEMENTARY INFORMATION:

*Title of Collection:* War Risk Insurance.

*Type of Request:* Extension of currently approved information collection.

*OMB Control Number:* 2133-0011.

*Form Numbers:* MA-355; MA-528; MA-742; MA-828; and MA-942.

*Expiration Date of Approval:* Three years from date of approval by the Office of Management and Budget.

*Summary of Collection of Information:* As authorized by section 1202, Title XII, Merchant Marine Act,

1936, as amended, the Secretary of the U.S. Department of Transportation may provide war risk insurance adequate for the needs of the waterborne commerce of the United States if such insurance cannot be obtained on reasonable terms from qualified insurance companies operating in the United States. This collection is required for the program. The collection consists of forms MA-355; MA-528; MA-742; MA-828; and MA-942.

*Need and Use of the Information:* The collected information is necessary to determine the eligibility of the applicant and the vessel(s) for participation in the war risk insurance program.

*Description of Respondents:* Vessel owners or charterers interested in participating in MARAD's war risk insurance program.

*Annual Responses:* 1,431.

*Annual Burden:* 768 hours.

*Comments:* Comments should refer to the docket number that appears at the top of this document. Written comments may be submitted to the Docket Clerk, U.S. DOT Dockets, Room PL-401, 400 Seventh Street, SW., Washington, DC 20590. Comments also may be submitted by electronic means via the Internet at <http://dms.dot.gov/submit>. Specifically address whether this information collection is necessary for proper performance of the functions of the agency and will have practical utility, accuracy of the burden estimates, ways to minimize this burden, and ways to enhance the quality, utility, and clarity of the information to be collected. All comments received will be available for examination at the above address between 10 a.m. and 5 p.m. e.d.t. (or e.s.t.), Monday through Friday, except Federal holidays. An electronic version of this document is available on the World Wide Web at <http://dms.dot.gov>.

*Privacy Act:* Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (volume 65, number 70, pages 19477-78), or you may visit <http://dms.dot.gov>.

**Authority:** 49 CFR 1.66.

Dated: April 12, 2004.

By Order of the Maritime Administrator.

**Joel C. Richard,**

*Secretary, Maritime Administration.*

[FR Doc. 04-8614 Filed 4-15-04; 8:45 am]

**BILLING CODE 4910-81-P**

## DEPARTMENT OF TRANSPORTATION

### Maritime Administration

#### Marine Transportation System National Advisory Council

**AGENCY:** Maritime Administration, DOT.

**ACTION:** National Advisory Council public meeting.

**SUMMARY:** The Maritime Administration announces that the Marine Transportation System National Advisory Council (MTSNAC) will hold a meeting to discuss MTS needs and other relevant issues, regional MTS outreach initiatives, Council team assignments, and other issues. A public comment period is scheduled for 8:30 a.m. to 9 a.m. on Tuesday, May 4, 2004. To provide time for as many people to speak as possible, speaking time for each individual will be limited to three minutes. Members of the public who would like to speak are asked to contact Raymond Barberesi by April 27, 2004. Commenters will be placed on the agenda in the order in which notifications are received. If time allows, additional comments will be permitted. Copies of oral comments must be submitted in writing at the meeting. Additional written comments are welcome and must be filed by May 11, 2004.

**DATES:** The meeting will be held on Monday, May 3, 2004, from 1 p.m. to 5 p.m. and Tuesday, May 4, 2004, from 8:30 a.m. to 12 p.m.

**ADDRESSES:** The meeting will be held in the Radisson Hotel and Suites, 160 E. Huron Street, Chicago, IL 60611. The hotel's phone number is (312) 787-2900.

**FOR FURTHER INFORMATION CONTACT:** Raymond Barberesi, (202) 366-4357; Maritime Administration, MAR-830, Room 7201, 400 Seventh St., SW., Washington, DC 20590; [Raymond.Barberesi@marad.dot.gov](mailto:Raymond.Barberesi@marad.dot.gov).

(**Authority:** 49 CFR 1.66.)

Dated: April 13, 2004.

**Joel C. Richard,**

*Secretary, Maritime Administration.*

[FR Doc. 04-8663 Filed 4-15-04; 8:45 am]

**BILLING CODE 4910-81-P**

## DEPARTMENT OF TRANSPORTATION

## National Highway Traffic Safety Administration

[Docket No. NHTSA-2002-12140; Notice 2]

**Decision That Nonconforming 1997 and 1998 Ferrari 456 GT and GTA Passenger Cars Are Eligible for Importation****AGENCY:** National Highway Traffic Safety Administration (NHTSA), DOT.**ACTION:** Notice of decision by NHTSA that nonconforming 1997 and 1998 Ferrari 456 GT and GTA passenger cars are eligible for importation.

**SUMMARY:** This notice announces the decision by NHTSA that 1997 and 1998 Ferrari 456 GT and GTA passenger cars not originally manufactured to comply with all applicable Federal motor vehicle safety standards are eligible for importation into the United States because they are substantially similar to vehicles originally manufactured for importation into and sale in the United States and certified by their manufacturer as complying with the safety standards (the U.S. certified version of the 1997 and 1998 Ferrari 456 GT and GTA), and they are capable of being readily altered to conform to the standards.

**DATES:** This decision is effective as of the date of its publication in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Coleman Sachs, Office of Vehicle Safety Compliance, NHTSA (202-366-3151).

**SUPPLEMENTARY INFORMATION:****Background**

Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable Federal motor vehicle safety standards shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under 49 U.S.C. 30115, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable Federal motor vehicle safety standards.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an

opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

G&K Automotive Conversion, Inc. of Santa Ana, California (G&K) (Registered Importer 90-007) petitioned NHTSA to decide whether 1997 and 1998 Ferrari 456 GT and GTA passenger cars are eligible for importation into the United States. NHTSA published notice of the petition on May 3, 2002 (67 FR 22498) to afford an opportunity for public comment. The reader is referred to that notice for a description of the petition.

Ferrari North America Inc. (FNA), the U.S. representative of the vehicle's manufacturer, Ferrari SpA, was the only commenter that responded to the notice of petition. In its comments, FNA addressed the conformity of non-U.S. certified 1997 and 1998 Ferrari 456 GT and GTA passenger cars with, or their capability to be conformed to, the following standards: Federal Motor Vehicle Safety Standard (FMVSS) Nos. 208, *Occupant Crash Protection*; 209, *Seat Belt Assemblies*; 214, *Side Impact Protection*; 216, *Roof Crush Resistance*; and the Bumper Standard found in 49 CFR part 581. FNA did not raise objections with regard to the conformity of the vehicles to any other standard identified in the petition.

After receiving these comments, NHTSA accorded G&K an opportunity to respond to the issues that FNA had raised. FNA's comments with respect to each of the standards at issue are set forth below, together with G&K's response to those comments and NHTSA's analysis of the matters in contention between the two. The agency's analysis is based on the contents of the petition, and on the comments submitted by G&K and FNA. FNA's comments, G&K's response, and NHTSA's analysis are separately stated below for each of the standards at issue.

1. FMVSS No. 208, *Occupant Crash Protection*, and FMVSS No. 209, *Seat Belt Assemblies*:

FNA challenged G&K's assertion in the petition that the seat belt assemblies of non-U.S. certified Ferrari 456 GT and GTA passenger cars are identical to those of the vehicles' U.S. certified counterparts. Ferrari contended that only the U.S. versions have an automatic retractor lock device for the child safety seat mounting.

G&K disputed this claim by stating that Ferrari SpA makes this feature available on vehicles manufactured for many markets around the world. To

ensure that all vehicles it imports have this feature, G&K stated that it will inspect those vehicles, and replace, with the part used in U.S. certified vehicles, any seat belt assemblies found not to incorporate the automatic retractor lock device. G&K further observed that these parts are readily available and can be installed through a very simple and straightforward procedure.

**NHTSA's Analysis:** Based on G&K's statement that it would replace non-conforming seat belts on non-U.S. certified 1997 and 1998 Ferrari 456 GT and GTA passenger cars with readily available U.S.-model belts, and the absence of any challenge from FNA regarding the feasibility of this modification, the agency has concluded that the vehicles' seat belt system can be readily modified to achieve compliance with FMVSS Nos. 208 and 209.

2. FMVSS No. 214, *Side Impact Protection*:

FNA acknowledged that G&K was correct in stating that the doors on non-U.S. certified 1997 and 1998 Ferrari 456 GT and GTA passenger cars must be reinforced to comply with FMVSS No. 214, but observed that G&K provided no details as to how the reinforcement would be made, what parts would be used, or how the modified doors would be tested. FNA provided schematics and a parts list showing that the part numbers for the doorframes are different for the U.S.-certified and the non-U.S. certified version of the vehicle.

G&K claimed that the door structure in the U.S. version of the vehicle and the non-U.S. version are identical except for the door beam and contended that door beam installation is simple. G&K further observed that NHTSA approved a similar petition for a 1995 Ferrari 456 (VSP 256) that entailed the installation of reinforcing door beams, that a crash test (as recommended initially by NHTSA) to confirm conformance of the vehicles with FMVSS No. 214 was unnecessary, and that reverse engineering and good engineering judgment could be used to confirm conformance with the dynamic test requirements of FMVSS No. 214, as was done with respect to a prior petition to establish that a Ferrari 550 complied with FMVSS No. 216, *Roof Crush Resistance*. With regard to the latter points, FNA contended that the petition should be judged on its own merits and not be dependent on previous petition approvals by the agency.

**NHTSA's Analysis:** The agency notes that G&K will be installing available OEM or equivalent side impact reinforcement bars in the doors of the models in question. G&K stated that the door structure, sills, and frames for the

U.S. and non-U.S. versions of the vehicle are the same and that once the additional horizontal reinforcement structure is in place, the modified non-U.S. model doors will essentially duplicate the crashworthiness of the doors installed on the U.S. model vehicle. FNA submitted with its July 19, 2002 comments on the petition an enclosure with illustrations of the type typically used by dealers to identify replacement/repair parts. This identified different part numbers for the right-hand and left-hand doorframes of U.S. and non-U.S. model Ferrari 456M GT and GTA vehicles. However, the differences, if any, were not described, nor was any information or data provided regarding how the differences would affect compliance with FMVSS No. 214.

G&K provided with its March 14, 2003 response to FNA's comments photographs of the door interior with the trim and door panel removed. These appeared to confirm G&K's contention that the bars can be positioned and welded to existing factory-located mounts already present on the non-U.S. model 456 doors. G&K also provided opinions from automotive consultants it retained that the door structure is the same and that the hinge and latch connections to the frame are identical for the two vehicles. This appears to be correct. The agency believes that once the non-U.S. model doors are modified, they should be equivalent in strength to the U.S. model doors and as capable of transferring side impact loads to the vehicle body through the "A" and "B" pillars.

A sketch included in the consultants' report shows the recommended design for side beams if OEM reinforcement bars are not used. This design consists of two one-inch by one-inch square tubes running parallel to one another and welded together. G&K's consultants offered a limited mathematical analysis of the modified structure using this non-OEM side beam structure as evidence that the doors, once modified, will not deflect to a degree exceeding the FMVSS specifications. FMVSS No. 214 requires that the average force to deflect the door 6 inches (initial crush resistance) cannot be less than 2250 pounds. The G&K analysis shows that a load of 2250 pounds results in a deflection of only 0.419 inches. The intermediate crush resistance value must not be less than 3500 pounds for a 12-inch deflection. G&K stated that for a 3500-pound load, the deflection is 0.422 inches. Lastly, a peak crush resistance less than two times the curb weight or 7000 pounds, whichever is less, must not exceed 18 inches

deflection. The G&K deflection is 0.876 inches at a load of 3500 pounds. It would appear that at 7000 pounds the deflection would be less than the maximum 18 inches allowed.

Finally, in a letter dated February 10, 2003, G&K stated, "We are of the opinion that we can utilize the method used in 67 FR 17479 to establish the vehicle's compliance with FMVSS No. 214." This refers to a **Federal Register** notice of a decision that nonconforming 2001 Ferrari model 550 passenger cars are eligible for importation. This notice states in part:

[The registered importer] stated that if it receives a vehicle with a door that lacks a door beam, it would replace the door with a U.S. model door. Based on these considerations, the agency has concluded that non-U.S. certified 2001 Ferrari 550 vehicles are capable of being readily modified to comply with FMVSS No. 214. (67 FR 17481)

However, G&K is not using the same basis for demonstrating compliance with FMVSS No. 214 as was used for the 2001 Ferrari 550 vehicles, which entailed the replacement of the non-U.S. model doors with U.S. model doors. Instead, G&K is using an equivalent structure.

NHTSA's review of G&K's proposed modifications and calculations, as well as its examination of the supplied photographs and parts list, have led the agency to conclude that the non-U.S. certified 1997 and 1998 Ferrari 456 GT and GTA, when equipped with doors modified as described by G&K, will meet the requirements of FMVSS No. 214.

### 3. FMVSS No. 216, *Roof Crush Resistance*:

FNA contended that G&K was incorrect in asserting that the body/roof and support structure and components of the non-U.S. certified Ferrari 456 GT and GTA are identical to those found in the U.S.-certified version of the vehicle. In its June 3, 2002 comments on the petition, FNA indicated that the roof frame of the U.S. certified Ferrari 456 is specially reinforced to comply with FMVSS No. 216. FNA further stated that the installation of a compliant roof would require removal of the existing European specified roof and pillars back to the C-Pillar and replacement of those components with U.S.-model parts. Photographs included in a submission from FNA to NHTSA dated May 7, 2003, showed additional roof support structures in the U.S. certified vehicle to consist of the following 8 components: two triangulated braces (gussets) in the rear corners, rear beam roof reinforcement, front beam roof reinforcement, two side beam

reinforcements, and two front side plate roof reinforcements. FNA reported that these structures are not present in the non-U.S. certified version of the vehicle.

G&K claimed that the U.S.-certified and the non-U.S. certified Ferrari 456 have identical roof structures, with the exception of the two triangulated braces (gussets) at the rear corners, found only in the U.S. certified models. After designing identical gussets and bonding them in place, G&K asserted that the roof structure on the non-U.S. certified vehicle would have structural strength identical to, or greater than, that of its U.S. certified counterpart.

**NHTSA's Analysis:** G&K provided photographs of the roof area of the non-U.S. certified Ferrari 456 taken from inside the vehicle with the headliner removed. Contrasting these photographs to the materials supplied by Ferrari revealed that the only visible difference between the roof structure of the U.S. certified vehicle and that of its non-U.S. certified counterpart is that gussets are located at the rear corners adjacent to the B-pillar crossover bar on the U.S. model but are not present on the non-U.S. certified model. A schematic diagram of the roof supplied by FNA revealed 14 different part numbers for the entire roof structure, depending on country of destination, but no specific parts delineation for the 8 separate roof reinforcement pieces that FNA described as being present only on the U.S. certified models. No information was offered by FNA as to what, if any, effect the variations it identified would have on FMVSS No. 216 compliance. Furthermore, FNA provided no discussion or calculations as to the strengthening increase provided by the 8 additional roof components. The same parts listing indicated variations for the U.S. and non-U.S. versions for cosmetic interior roof components, none of which would affect the roof crush resistance. The gussets that G&K observed on the U.S. version alone were not identified on the parts listing described above.

A parts list later supplied by FNA included part numbers for the 8 additional roof structural components and FNA supplied photographs showing the assembly of these components into the roof. The photographs did in fact show the installation of the rear gussets, front and rear lateral rods, longitudinal rods on both sides, and side plate reinforcements at the "A" pillars. From the photographs, it appeared that this reinforcement would only be visible with the sheet metal roof removed. G&K stated that it was unable to remove the roof without destructive consequences, but claimed that the components were in fact present and could be detected in

the structure of the roof interior and visually through large holes in roof beam members. This G&K claim could not be substantiated by NHTSA.

However, of greatest significance to NHTSA was the roof reinforcement that was in place at the "A" pillars of the U.S.-certified vehicle, in a position where the FMVSS No. 216 loading plate would be contacting the roof. This area would in effect be the primary location at which the principal loading would be resisted by the roof structure. In light of FNA's contention that this reinforcement only existed on the U.S. certified model, NHTSA asked that G&K provide documentation or other evidence to confirm that the structural reinforcement was also in place at this location on the non-U.S. certified vehicle. At that juncture, G&K agreed to have non-destructive X-rays of this area taken to show whether the required support was in place. The X-rays appeared to confirm that the side plate reinforcements were present.

Lastly, G&K provided from its automotive consultant a limited mathematical analysis of the fabricated gussets to be added to the rear "B" pillars of the non-U.S. certified vehicle. These gussets are dimensionally similar to those found on the U.S. certified version of the vehicle, and the bonding method appears to provide sufficient strength to resist the shear forces present during roof crush testing.

Based on its examination of the materials illustrating the structural components of the vehicle's roof, the X-ray evidence furnished by G&K that appeared to confirm that "A" pillar support plates are in place on both sides of the non-U.S. certified vehicle, and its review of the modification involving the fabrication and installation of rear gussets that G&K proposed, the agency is satisfied that the non-U.S. certified Ferrari 456, when modified in this fashion, will comply with FMVSS No. 216.

4. 49 CFR Part 581, *Bumper Standard*:

In the petition, G&K stated that the bumpers on non-U.S. certified Ferrari 456 passenger cars would have to be modified to comply with the Bumper Standard in 49 CFR part 581. It contended that such modifications can be made by using steel or the bumper assemblies found on U.S. certified versions of the vehicle. FNA observed that G&K did not describe how it would modify the bumpers by using the steel or how it would assure that such modifications actually achieve compliance with part 581. FNA further stated that the differences in the bumpers of the U.S. certified and the non-U.S. certified versions of the

vehicle are structural and not cosmetic and that the U.S. certified version is reinforced to comply with more stringent U.S. bumper requirements.

G&K responded that there is a standard industry practice among registered importers concerning reinforcing bumper structures and that OEM bumpers are readily available and easily installed. G&K further noted that the mounting points to which the bumpers attach are the same in all markets, that the bumpers vary only slightly for different countries, that aluminum shims behind the bumper structure must be replaced with rubber to be identical to the U.S. bumper system, and that in some cases the corners of the bumpers must be reinforced. G&K also stated that all vehicles would be inspected to determine the necessary modifications that each will require. G&K did note that its automotive consultant compared the petitioned vehicle to its U.S. certified counterpart, and concluded that the only differences between the two models were that front and rear marker lights are installed on the U.S. certified vehicle while none are present on the non-U.S. certified version, and the number plate mounts are different for the two vehicles.

*NHTSA's Analysis:* G&K acknowledged that the bumpers must be modified to meet U.S. requirements. Part numbers provided by G&K identifying the U.S. bumpers that may be used in the modification, when cross-referenced to the parts listing from FNA, are correct. G&K provided details as to the modifications that may be necessary, including bumper and shim replacement, correction of shim variations, addition of reinforcement at the corners, and installation of marker lights and number plate mounts. Photographs provided by G&K of bumpers on U.S. certified and non-U.S. certified vehicles confirm that the marker lights and plate mountings are different. In addition, review of the FNA parts listing and schematic reveals that virtually all components positioned between the external bumper facing and the vehicle body are identical between the U.S. certified and the non-U.S. certified versions, providing further evidence of the vehicles' similarities in this regard. NHTSA further notes that the only parts on the parts list FNA supplied to the agency that are delineated as being different between the U.S. certified and the non-U.S. certified version of the vehicle are those comprising the bumper facing itself, and not any supporting structure. FNA did not contend that the modifications described by G&K would be insufficient

to achieve compliance with the Bumper Standard. For those reasons, the agency has concluded that non-U.S. certified 1997 and 1998 Ferrari 456 vehicles are capable of being readily modified to meet the requirements of that standard.

### Conclusion

Based on its consideration of the information submitted by the petitioner and FNA, NHTSA has decided to grant the petition.

### Vehicle Eligibility Number for Subject Vehicles

The importer of a vehicle admissible under any final decision must indicate on the form HS-7 accompanying entry the appropriate vehicle eligibility number indicating that the vehicle is eligible for entry. VSP-408 is the vehicle eligibility number assigned to vehicles admissible under this notice of final decision.

### Final Decision

Accordingly, on the basis of the foregoing, NHTSA hereby decides that 1997 and 1998 Ferrari 456 GT and GTA passenger cars that were not originally manufactured to comply with all applicable Federal motor vehicle safety standards are substantially similar to 1997 and 1998 Ferrari 456 GT and GTA passenger cars originally manufactured for importation into, and sale in, the United States and certified under 49 U.S.C. 30115, and are capable of being readily altered to conform to all applicable Federal motor vehicle safety standards.

**Authority:** 49 U.S.C. 30141(a)(1)(A) and (b)(1); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: April 12, 2004.

**Kenneth N. Weinstein,**

*Associate Administrator for Enforcement.*

[FR Doc. 04-8712 Filed 4-15-04; 8:45 am]

BILLING CODE 4910-59-P

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

[Docket No. NHTSA-2004-17525]

### Evaluation of Rear Window Defrosting and Defogging Systems; Technical Report

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

**ACTION:** Request for comments on technical report.

**SUMMARY:** This notice announces NHTSA's publication of a technical

report evaluating rear window defrosting and defogging systems. The report's title is *Evaluation of Rear Window Defrosting and Defogging Systems*.

**DATES:** Comments must be received no later than August 16, 2004.

**ADDRESSES:** *Report:* The report is available on the Internet for viewing on line in HTML format at <http://www.nhtsa.dot.gov/cars/rules/regrev/Evaluate/rearwindow-report/index.htm> and in PDF format at <http://www.nhtsa.dot.gov/cars/rules/regrev/Evaluate/rearwindow-report/rearwindowreport.pdf>. You may also obtain a copy of the report free of charge by sending a self-addressed mailing label to Christina Morgan (NPO-321), National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590.

*Comments:* You may submit comments [identified by DOT DMS Docket Number NHTSA-2004-17525] by any of the following methods:

- Web site: <http://dms.dot.gov>.

Follow the instructions for submitting comments on the DOT electronic docket site.

- Fax: 1-202-493-2251.

- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL-401, Washington, DC 20590-001.

- Hand Delivery: Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

- Federal eRulemaking Portal: Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

You may call Docket Management at 202-366-9324 and visit the Docket from 10 a.m. to 5 p.m., Monday through Friday.

**FOR FURTHER INFORMATION CONTACT:** Christina Morgan, Evaluation Division, NPO-321, Office of Planning, Evaluation and Budget, National Highway Traffic Safety Administration, Room 5208, 400 Seventh Street, SW., Washington, DC 20590. Telephone: 202-366-2562. FAX: 202-366-2559. E-mail: [tmorgan@nhtsa.dot.gov](mailto:tmorgan@nhtsa.dot.gov).

For information about NHTSA's evaluations of the effectiveness of existing regulations and programs: Visit the NHTSA Web site at <http://www.nhtsa.dot.gov> and click "Regulations & Standards" underneath "Vehicle & Equipment Information" on the home page; then click "Regulatory

Evaluation" on the "Regulations & Standards" page.

**SUPPLEMENTARY INFORMATION:** Rear window defrosting and defogging systems are not required on motor vehicles by any Federal standard. However, NHTSA from time to time evaluates technologies that are widely available on production vehicles and might have an impact on safety. Rear window defoggers became available as optional or standard equipment in most cars during the 1970's or 1980's and are popular with consumers. Today, almost all passenger cars, minivans, and sport utility vehicles have rear window defoggers, but most pickup trucks and full-size vans do not.

The analysis examined whether there were proportionately fewer backing-up and changing-lane crashes involving cars with rear-window defoggers than cars without rear-window defoggers. The database was extracted from State crash files. The analyses did not show a benefit for rear window defoggers. The main analysis found that rear window defoggers have no effect on changing lane and backing crashes in conditions when they are most likely used (when raining or snowing, during the earlier part of the morning, or during winter).

Even though this study did not show a tangible safety benefit, it is understandable that rear window defoggers are well received by consumers because they conveniently clear condensation, frost, ice, and/or snow from the back window.

#### **How Can I Influence NHTSA's Thinking on This Subject?**

NHTSA welcomes public review of the technical report and invites reviewers to submit comments about the data and the statistical methods used in the analyses. NHTSA will submit to the Docket a response to the comments and, if appropriate, additional analyses that supplement or revise the technical report.

#### **How Do I Prepare and Submit Comments?**

Your comments must be written and in English. To ensure that your comments are correctly filed in the Docket, please include the Docket number of this document (NHTSA-2004-17525) in your comments.

Your primary comments must not be more than 15 pages long (49 CFR 553.21). However, you may attach additional documents to your primary comments. There is no limit on the length of the attachments.

Please send two paper copies of your comments to Docket Management, submit them electronically, fax them, or

use the Federal eRulemaking Portal. The mailing address is U. S. Department of Transportation Docket Management, Room PL-401, 400 Seventh Street, SW., Washington, DC 20590. If you submit your comments electronically, log onto the Dockets Management System Web site at <http://dms.dot.gov> and click on "Help" to obtain instructions. The fax number is 1-202-493-2251. To use the Federal eRulemaking Portal, go to <http://www.regulations.gov> and follow the online instructions for submitting comments.

We also request, but do not require you to send a copy to Christina Morgan, Evaluation Division, NPO-321, National Highway Traffic Safety Administration, Room 5208, 400 Seventh Street, SW., Washington, DC 20590 (alternatively, FAX to 202-366-2559 or e-mail to [ctmorgan@nhtsa.dot.gov](mailto:ctmorgan@nhtsa.dot.gov)). She can check if your comments have been received at the Docket and she can expedite their review by NHTSA.

#### **How Can I Be Sure That My Comments Were Received?**

If you wish Docket Management to notify you upon its receipt of your comments, enclose a self-addressed, stamped postcard in the envelope containing your comments. Upon receiving your comments, Docket Management will return the postcard by mail.

#### **How Do I Submit Confidential Business Information?**

If you wish to submit any information under a claim of confidentiality, send three copies of your complete submission, including the information you claim to be confidential business information, to the Chief Counsel, NCC-01, National Highway Traffic Safety Administration, Room 5219, 400 Seventh Street, SW., Washington, DC 20590. Include a cover letter supplying the information specified in our confidential business information regulation (49 CFR part 512).

In addition, send two copies from which you have deleted the claimed confidential business information to Docket Management, Room PL-401, 400 Seventh Street, SW., Washington, DC 20590, or submit them electronically.

#### **Will the Agency Consider Late Comments?**

In our response, we will consider all comments that Docket Management receives before the close of business on the comment closing date indicated above under **DATES**. To the extent possible, we will also consider comments that Docket Management receives after that date.

Please note that even after the comment closing date, we will continue to file relevant information in the Docket as it becomes available. Further, some people may submit late comments. Accordingly, we recommend that you periodically check the Docket for new material.

### How Can I Read the Comments Submitted by Other People?

You may read the comments by visiting Docket Management in person at Room PL-401, 400 Seventh Street, SW., Washington, DC from 10 a.m. to 5 p.m., Monday through Friday.

You may also see the comments on the Internet by taking the following steps:

A. Go to the Docket Management System (DMS) Web page of the Department of Transportation (<http://dms.dot.gov>).

B. On that page, click on "Simple Search."

C. On the next page (<http://dms.dot.gov/search/searchFormSimple.cfm/>) type in the five-digit Docket number shown at the beginning of this Notice (17525). Click on "Search."

D. On the next page, which contains Docket summary information for the Docket you selected, click on the desired comments. You may also download the comments.

**Authority:** 49 U.S.C. 30111, 30168; delegation of authority at 49 CFR 1.50 and 501.8.

**James F. Simons,**

*Office Director for the Office of Regulatory Analysis and Evaluation.*

[FR Doc. 04-8632 Filed 4-15-04; 8:45 am]

**BILLING CODE 4910-59-P**

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

#### Release of Waybill Data

The Surface Transportation Board has received a request from Zuckert Scoutt & Rasenberger on behalf of the Norfolk Southern Railway Company (WB568-3-4/8/2004) for permission to use certain data from the Board's 2002 Carload Waybill Sample. A copy of the request may be obtained from the Office of Economics, Environmental Analysis, and Administration.

The waybill sample contains confidential railroad and shipper data; therefore, if any parties object to these requests, they should file their objections with the Director of the Board's Office of Economics, Environmental Analysis, and

Administration within 14 calendar days of the date of this notice. The rules for release of waybill data are codified at 49 CFR 1244.9.

**FOR FURTHER INFORMATION CONTACT:** Mac Frampton, (202) 565-1541.

**Vernon A. Williams,**  
*Secretary.*

[FR Doc. 04-8667 Filed 4-15-04; 8:45 am]

**BILLING CODE 4915-01-P**

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

#### [STB Finance Docket No. 34490]

#### Union Pacific Railroad Company— Temporary Trackage Rights Exemption—The Burlington Northern and Santa Fe Railway Company

The Burlington Northern and Santa Fe Railway Company (BNSF) has agreed to grant temporary overhead trackage rights to Union Pacific Railroad Company (UP) over BNSF's rail lines between BNSF milepost 69.6 near Spokane, WA, and BNSF milepost 1400.00 near Sandpoint, ID, a distance of approximately 70.0 miles.<sup>1</sup>

The transaction is scheduled to be consummated on May 7, 2004, and the authorization is expected to expire on or about October 2, 2004. The purpose of the temporary rights is to facilitate maintenance work on UP lines.

As a condition to this exemption, any employee affected by the acquisition of the temporary trackage rights will be protected by the conditions imposed in *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653 (1980), and, in accordance with the decision of the United States Court of Appeals for the District of Columbia Circuit in *United Transportation Union—General Committee of Adjustment (GO-386) v. Surface Transportation Board*, No. 03-1212, 2004 U.S. App. LEXIS 6496 (D.C. Cir. Apr. 6, 2004), any employee affected by the discontinuance of those trackage rights will be protected by the conditions set out in *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979).

This notice is filed under 49 CFR 1180.2(d)(8). If it contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10502(d)

<sup>1</sup> The trackage rights involve BNSF track segments with non-contiguous mileposts. Therefore, total mileage does not correspond to the milepost designations of the endpoints.

may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34490, must be filed with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423-0001. In addition, a copy of each pleading must be served on Robert T. Opal, 1416 Dodge St., Room 830, Omaha, NE 68179.

Board decisions and notices are available on our Web site at <http://www.stb.dot.gov>.

Decided: April 12, 2004.

By the Board, David M. Konschnik,  
Director, Office of Proceedings.

**Vernon A. Williams,**  
*Secretary.*

[FR Doc. 04-8666 Filed 4-15-04; 8:45 am]

**BILLING CODE 4915-01-P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### Open Meeting of the Area 4 Taxpayer Advocacy Panel (including the states of Illinois, Indiana, Kentucky, Michigan, Ohio, West Virginia, and Wisconsin)

**AGENCY:** Internal Revenue Service (IRS) Treasury.

**ACTION:** Notice.

**SUMMARY:** An open meeting of the Area 4 Taxpayer Advocacy Panel will be conducted (via teleconference). The Taxpayer Advocacy Panel is soliciting public comment, ideas, and suggestions on improving customer service at the Internal Revenue Service.

**DATES:** The meeting will be held Wednesday, May 19, 2004, at 8 a.m., central daylight time.

**FOR FURTHER INFORMATION CONTACT:** Mary Ann Delzer at 1-888-912-1227, or (414) 297-1604.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that a meeting of the Area 4 Taxpayer Advocacy Panel will be held Wednesday, May 19, 2004, at 8 a.m., central daylight time via a telephone conference call. You can submit written comments to the panel by faxing to (414) 297-1623, or by mail to Taxpayer Advocacy Panel, Stop1006MIL, 310 West Wisconsin Avenue, Milwaukee, WI 53203-2221, or you can contact us at <http://www.improveirs.org>. This meeting not required to be open to the public, but because we are always interested in community input, we will

accept public comments. Please contact Mary Ann Delzer at 1-888-912-1227 or (414) 297-1604 for dial-in information.

The agenda will include the following: Various IRS issues.

Dated: April 12, 2004.

**Bernard Coston,**

*Director, Taxpayer Advocacy Panel.*

[FR Doc. 04-8702 Filed 4-15-04; 8:45 am]

**BILLING CODE 4830-01-P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### Open Meeting of the Taxpayer Advocacy Panel, E-Filing Issue Committee.

**AGENCY:** Internal Revenue Service (IRS) Treasury.

**ACTION:** Notice.

**SUMMARY:** An open meeting of the E-Filing Issue Committee will be conducted (via teleconference). The Taxpayer Advocacy Panel is soliciting public comment, ideas, and suggestions on improving customer service at the Internal Revenue Service.

**DATES:** The meeting will be held Thursday, May 13, 2004, from 3 to 4 p.m., eastern daylight time.

**FOR FURTHER INFORMATION CONTACT:** Mary Ann Delzer at 1-888-912-1227, or (414) 297-1604.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel, E-Filing Issue Committee will be held Thursday, May 13, 2004, from 3 to 4 p.m., eastern daylight time via a telephone conference call. You can submit written comments to the panel by faxing to (414) 297-1623, or by mail to Taxpayer Advocacy Panel, Stop 1006MIL, 310 West Wisconsin Avenue, Milwaukee, WI 53203-2221, or on the Web site at <http://www.improveirs.org>. Public comments will also be welcome during the meeting. Please contact Mary Ann Delzer at 1-888-912-1227 or (414) 297-1604 for dial-in information.

*The agenda will include the following:* Various IRS issues.

Dated: April 12, 2004.

**Bernard Coston,**

*Director, Taxpayer Advocacy Panel.*

[FR Doc. 04-8703 Filed 4-15-04; 8:45 am]

**BILLING CODE 4830-01-P**

## DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0222]

### Agency Information Collection Activity: Proposed Collection; Comment Request

**AGENCY:** National Cemetery Administration, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (PRA) of 1995, (44 U.S.C. 3501-21), this notice announces that the National Cemetery Administration (NCA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and includes the actual data collection instrument.

**DATES:** Comments must be submitted on or before May 17, 2004.

#### FOR FURTHER INFORMATION CONTACT:

Denise McLamb, Records Management Service (005E3), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273-8030 or Fax (202) 273-5981, or e-mail: [denise.mclamb@mail.va.gov](mailto:denise.mclamb@mail.va.gov). Please refer to "OMB Control No. 2900-0222" in any correspondence.

Send comments and recommendations concerning any aspect of the information collection to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503, (202) 395-7316. Please refer to "OMB Control No. 2900-0222" in any correspondence.

#### SUPPLEMENTARY INFORMATION:

**Title:** Application for Standard Government Headstone or Marker for Installation in a Private or State Veterans' Cemetery, VA Form 40-1330. **OMB Control Number:** 2900-0222.

**Type of Review:** Extension of a currently approved collection.

**Abstract:** The form is used by the next of kin or other responsible parties to apply for Government-provided headstones or markers for unmarked graves of eligible veterans. The information is used by VA to determine the veteran's eligibility for, and entitlement to this benefit.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register**

Notice with a 60-day comment period soliciting comments on this collection of information was published on January 23, 2004 at page 3431.

**Affected Public:** Individuals or households.

**Estimated Annual Burden:** 83,500 hours.

**Estimated Average Burden Per Respondent:** 15 minutes.

**Frequency of Response:** On occasion.

**Estimated Number of Respondents:** 334,000.

Dated: April 6, 2004.

By direction of the Secretary.

**Loise Russell,**

*Director, Records Management Service.*

[FR Doc. 04-8655 Filed 4-15-04; 8:45 am]

**BILLING CODE 8320-01-P**

## DEPARTMENT OF VETERANS AFFAIRS

### Advisory Committee on Cemeteries and Memorials; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92-463 (Federal Advisory Committee Act) that a meeting of the Advisory Committee on Cemeteries and Memorials will be held on May 5-6, 2004, at the Marines' Memorial Club and Hotel, 609 Sutter Street, San Francisco, CA. The meeting will be held in the Regimental Room, beginning at 8 a.m. and concluding at 5 p.m. on both days. The meeting is open to the public.

The purpose of the Committee is to advise the Secretary of Veterans Affairs on the administration of national cemeteries, soldiers' lots and plots, the selection of new national cemetery sites, the erection of appropriate memorials, and the adequacy of Federal burial benefits. The Committee will make recommendations to the Secretary regarding these activities.

On May 5, the Committee will receive updates on the previous meeting's recommendations, field operations and current National Cemetery Administration issues and information relating to San Francisco and Golden Gate National Cemeteries. In the afternoon, the Committee will travel to the San Francisco and Golden Gate National Cemeteries. On the morning of May 6, the Committee will travel to Memorial Service Network (MSN) Region Five for briefs by MSN personnel. In the afternoon, the Committee will reconvene for the business session and conclude with discussions of any unfinished business and recommendations for future programs, meeting sites, and agenda topics.

Time will not be allocated for receiving oral presentations from the public. Any member of the public wishing to attend the meeting is requested to contact Mr. Timothy Boulay, Designated Federal Officer, at (202) 273-5204. The Committee will accept written comments. Comments can be transmitted electronically to the Committee at *Timothy.Boulay@mail.va.gov* or mailed to National Cemetery Administration (40), 810 Vermont Avenue, NW., Washington, DC 20420. In the public's communications with the Committee, the writers must identify themselves and state the organizations, associations, or persons they represent.

Dated: April 2, 2004.

By Direction of the Secretary.

**E. Philip Riffin,**

*Committee Management Officer.*

[FR Doc. 04-8656 Filed 4-15-04; 8:45 am]

**BILLING CODE 8320-01-M**

## **DEPARTMENT OF VETERANS AFFAIRS**

### **Geriatrics and Gerontology Advisory Committee; Notice of Meeting**

The Department of Veterans Affairs gives notice under Public Law 92-463 (Federal Advisory Committee Act) that a meeting of the Geriatrics and Gerontology Advisory Committee (GGAC) will be held on May 14, 2004, at the Department of Veterans Affairs Central Office, 810 Vermont Avenue, NW., Washington, DC. The meeting will convene in Room 730 at 8:30 a.m. and conclude at 4:30 p.m. The meeting is open to the public.

The purpose of the Committee is to provide advice to the Secretary of Veterans Affairs and the Under Secretary for Health on all matters pertaining to geriatrics and gerontology by assessing the capability of VA health care facilities to meet the medical, psychological and social needs of older veterans and by evaluating VA facilities designated as Geriatric Research, Education and Clinical Centers (GRECCs).

The meeting will feature presentations by the Under Secretary for

Health and several Chief Consultants within the Veterans Health Administration. Those presentations will include an overview of VA's geriatrics program and briefings on geriatrics training, geriatrics research initiatives, GREC site visits in 2002-2004, and long range plans for the GGAC.

No time will be allocated at this meeting for receiving oral presentations from the public. Interested parties can provide written comments for review by the Committee in advance to the meeting to Mr. Daniel Converse, Designated Federal Officer, Geriatrics and Extended Care Strategic Healthcare Group (114), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420. Individuals who wish to attend the meeting should contact Ms. Jacqueline Holmes, Staff Assistant, at (202) 273-8539.

Dated: April 6, 2004.

By Direction of the Secretary.

**E. Philip Riffin,**

*Committee Management Officer.*

[FR Doc. 04-8657 Filed 4-15-04; 8:45 am]

**BILLING CODE 8320-01-M**



# Federal Register

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Friday,  
April 16, 2004

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## Part II

### Securities and Exchange Commission

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**Public Company Accounting Oversight  
Board; Notice of Filing of Proposed Rule  
on Auditing Standard No. 2, *An Audit of  
Internal Control Over Financial  
Reporting Performed in Conjunction  
With an Audit of Financial  
Statements*; Notice**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49544; File No. PCAOB–2004–03]

### Public Company Accounting Oversight Board; Notice of Filing of Proposed Rule on Auditing Standard No. 2, *An Audit of Internal Control Over Financial Reporting Performed in Conjunction With an Audit of Financial Statements*

April 8, 2004.

Pursuant to Section 107(b) of the Sarbanes-Oxley Act of 2002 (the “Act”), notice is hereby given that on March 18, 2004, the Public Company Accounting Oversight Board (the “Board” or the “PCAOB”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule described in Items I and II below, which items have been prepared by the Board. The Commission is publishing this notice to solicit comments on the proposed rule from interested persons.

### I. Board’s Statement of the Terms of Substance of the Proposed Rule

On March 9, 2004, the Board adopted a rule, Auditing Standard No. 2, *An Audit of Internal Control Over Financial Reporting Performed in Conjunction With an Audit of Financial Statements* (“the proposed rule”).

The proposed rule text is set out below.

### II. Board’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule

In its filing with the Commission, the Board included statements concerning the purpose of, and basis for, the proposed rule and discussed any comments it received on the proposed rule. The text of these statements may be examined at the places specified in Item IV below. The Board has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

### A. Board’s Statement of the Purpose Of, and Statutory Basis for, the Proposed Rule

#### (a) Purpose

Section 103(a)(1) of the Act authorized the PCAOB to establish, by rule, auditing standards to be used by registered public accounting firms in the preparation and issuance of audit reports, as required by the Act. PCAOB Rule 3100, “Compliance With Auditing and Related Professional Practice Standards,” requires auditors to comply with all applicable auditing and related professional practice standards established by the PCAOB. The text of the proposed rule, including an appendix of illustrative auditor’s reports, is set out below.

### Auditing Standard No. 2—An Audit of Internal Control Over Financial Reporting Performed in Conjunction With an Audit of Financial Statements

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## Applicability of Standard

1. This standard establishes requirements and provides directions that apply when an auditor is engaged to audit both a company's financial statements and management's assessment of the effectiveness of internal control over financial reporting.

**Note:** The term *auditor* includes both public accounting firms registered with the Public Company Accounting Oversight Board ("PCAOB" or the "Board") and associated persons thereof.

2. A company subject to the reporting requirements of the Securities Exchange Act of 1934 (an "issuer") is required to include in its annual report a report of management on the company's internal control over financial reporting. Registered investment companies, issuers of asset-backed securities, and nonpublic companies are not subject to the reporting requirements mandated by Section 404 of the Sarbanes-Oxley Act of 2002 (the "Act") (PL 107–204). The report of management is required to contain management's assessment of the effectiveness of the company's internal control over financial reporting as of the

end of the company's most recent fiscal year, including a statement as to whether the company's internal control over financial reporting is effective. The auditor that audits the company's financial statements included in the annual report is required to attest to and report on management's assessment. The company is required to file the auditor's attestation report as part of the annual report.

**Note:** The term issuer means an issuer (as defined in Section 3 of the Securities Exchange Act of 1934), the securities of which are registered under Section 12 of that Act, or that is required to file reports under Section 15(d) of that Act, or that files or has filed a registration statement with the Securities and Exchange Commission ("SEC" or "Commission") that has not yet become effective under the Securities Act of 1933, and that it has not withdrawn.

**Note:** Various parts of this standard summarize legal requirements imposed on issuers by the SEC, as well as legal requirements imposed on auditors by regulatory authorities other than the PCAOB. These parts of the standard are intended to provide context and to promote the auditor's understanding of the relationship between his or her obligations under this standard and his or her other legal responsibilities. The standard does not incorporate these legal requirements by reference and is not an interpretation of those other requirements and should not be so construed. (This Note does not apply to references in the standard to the existing professional standards and the Board's interim auditing and related professional practice standards.)

3. This standard is the standard on attestation engagements referred to in Section 404(b) of the Act. This standard is also the standard referred to in Section 103(a)(2)(A)(iii) of the Act. Throughout this standard, the auditor's attestation of management's assessment of the effectiveness of internal control over financial reporting required by Section 404(b) of the Act is referred to as the *audit of internal control over financial reporting*.

**Note:** The two terms *audit of internal control over financial reporting* and *attestation of management's assessment of the effectiveness of internal control over financial reporting* refer to the same professional service. The first refers to the process, and the second refers to the result of that process.

## Auditor's Objective in an Audit of Internal Control Over Financial Reporting

4. The auditor's objective in an audit of internal control over financial reporting is to express an opinion on management's assessment of the effectiveness of the company's internal control over financial reporting. To form a basis for expressing such an opinion, the auditor must plan and perform the audit to obtain reasonable assurance about whether the company maintained, in all material respects, effective internal control over financial reporting as of the date specified in management's assessment. The auditor also must audit the company's financial statements as of the date specified in management's

assessment because the information the auditor obtains during a financial statement audit is relevant to the auditor's conclusion about the effectiveness of the company's internal control over financial reporting. Maintaining effective internal control over financial reporting means that no material weaknesses exist; therefore, the objective of the audit of internal control over financial reporting is to obtain reasonable assurance that no material weaknesses exist as of the date specified in management's assessment.

5. To obtain reasonable assurance, the auditor evaluates the assessment performed by management and obtains and evaluates evidence about whether the internal control over financial reporting was designed and operated effectively. The auditor obtains this evidence from a number of sources, including using the work performed by others and performing auditing procedures himself or herself.

6. The auditor should be aware that persons who rely on the information concerning internal control over financial reporting include investors, creditors, the board of directors and audit committee, and regulators in specialized industries, such as banking or insurance. The auditor should be aware that external users of financial statements are interested in information on internal control over financial reporting because it enhances the quality of financial reporting and increases their confidence in financial information, including financial information issued between annual reports, such as quarterly information. Information on internal control over financial reporting is also intended to provide an early warning to those inside and outside the company who are in a position to insist on improvements in internal control over financial reporting, such as the audit committee and regulators in specialized industries. Additionally, Section 302 of the Act and Securities Exchange Act Rule 13a-14(a) or 15d-14(a),<sup>1</sup> whichever applies, require management, with the participation of the principal executive and financial officers, to make quarterly and annual certifications with respect to the company's internal control over financial reporting.

#### Definitions Related to Internal Control Over Financial Reporting

7. For purposes of management's assessment and the audit of internal control over financial reporting in this

standard, *internal control over financial reporting* is defined as follows:

A process designed by, or under the supervision of, the company's principal executive and principal financial officers, or persons performing similar functions, and effected by the company's board of directors, management, and other personnel, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles and includes those policies and procedures that:

(1) Pertain to the maintenance of records that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the company;

(2) Provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the company are being made only in accordance with authorizations of management and directors of the company; and

(3) Provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of the company's assets that could have a material effect on the financial statements.

**Note:** This definition is the same one used by the SEC in its rules requiring management to report on internal control over financial reporting, except the word "registrant" has been changed to "company" to conform to the wording in this standard. (See Securities Exchange Act Rules 13a-15(f) and 15d-15(f).<sup>2</sup>)

**Note:** Throughout this standard, *internal control over financial reporting* (singular) refers to the process described in this paragraph. Individual controls or subsets of controls are referred to as *controls* or *controls over financial reporting*.

8. A *control deficiency* exists when the design or operation of a control does not allow management or employees, in the normal course of performing their assigned functions, to prevent or detect misstatements on a timely basis.

- A deficiency in *design* exists when (a) a control necessary to meet the control objective is missing or (b) an existing control is not properly designed so that, even if the control operates as designed, the control objective is not always met.

- A deficiency in *operation* exists when a properly designed control does not operate as designed, or when the

person performing the control does not possess the necessary authority or qualifications to perform the control effectively.

9. A *significant deficiency* is a control deficiency, or combination of control deficiencies, that adversely affects the company's ability to initiate, authorize, record, process, or report external financial data reliably in accordance with generally accepted accounting principles such that there is more than a remote likelihood that a misstatement of the company's annual or interim financial statements that is more than inconsequential will not be prevented or detected.

**Note:** The term "remote likelihood" as used in the definitions of *significant deficiency* and *material weakness* (paragraph 10) has the same meaning as the term "remote" as used in Financial Accounting Standards Board Statement No. 5, *Accounting for Contingencies* ("FAS No. 5"). Paragraph 3 of FAS No. 5 states:

When a loss contingency exists, the likelihood that the future event or events will confirm the loss or impairment of an asset or the incurrence of a liability can range from probable to remote. This Statement uses the terms *probable*, *reasonably possible*, and *remote* to identify three areas within that range, as follows:

a. *Probable*. The future event or events are likely to occur.

b. *Reasonably possible*. The chance of the future event or events occurring is more than remote but less than likely.

c. *Remote*. The chance of the future events or events occurring is slight.

Therefore, the likelihood of an event is "more than remote" when it is either reasonably possible or probable.

**Note:** A misstatement is *inconsequential* if a reasonable person would conclude, after considering the possibility of further undetected misstatements, that the misstatement, either individually or when aggregated with other misstatements, would clearly be immaterial to the financial statements. If a reasonable person could not reach such a conclusion regarding a particular misstatement, that misstatement is *more than inconsequential*.

10. A *material weakness* is a significant deficiency, or combination of significant deficiencies, that results in more than a remote likelihood that a material misstatement of the annual or interim financial statements will not be prevented or detected.

**Note:** In evaluating whether a control deficiency exists and whether control deficiencies, either individually or in combination with other control deficiencies, are significant deficiencies or material weaknesses, the auditor should consider the definitions in paragraphs 8, 9 and 10, and the directions in paragraphs 130 through 137. As explained in paragraph 23, the evaluation of the materiality of the control deficiency

<sup>1</sup> See 17 CFR 240.13a-14(a) or 17 CFR 240.15d-14(a), whichever applies.

<sup>2</sup> See 17 CFR 240, 13a-15(f) and 15d-15(f).

should include both quantitative and qualitative considerations. Qualitative factors that might be important in this evaluation include the nature of the financial statement accounts and assertions involved and the reasonably possible future consequences of the deficiency. Furthermore, in determining whether a control deficiency or combination of deficiencies is a significant deficiency or a material weakness, the auditor should evaluate the effect of compensating controls and whether such compensating controls are effective.

11. Controls over financial reporting may be *preventive controls* or *detective controls*.

- Preventive controls have the objective of preventing errors or fraud from occurring in the first place that could result in a misstatement of the financial statements.
- Detective controls have the objective of detecting errors or fraud that have already occurred that could result in a misstatement of the financial statements.

12. Even well-designed controls that are operating as designed might not prevent a misstatement from occurring. However, this possibility may be countered by overlapping preventive controls or partially countered by detective controls. Therefore, effective internal control over financial reporting often includes a combination of preventive and detective controls to achieve a specific control objective. The auditor's procedures as part of either the audit of internal control over financial reporting or the audit of the financial statements are not part of a company's internal control over financial reporting.

#### **Framework Used by Management To Conduct Its Assessment**

13. Management is required to base its assessment of the effectiveness of the company's internal control over financial reporting on a suitable, recognized control framework established by a body of experts that followed due-process procedures, including the broad distribution of the framework for public comment. In addition to being available to users of management's reports, a framework is suitable only when it:

- Is free from bias;
- Permits reasonably consistent qualitative and quantitative measurements of a company's internal control over financial reporting;
- Is sufficiently complete so that those relevant factors that would alter a conclusion about the effectiveness of a company's internal control over financial reporting are not omitted; and
- Is relevant to an evaluation of internal control over financial reporting.

#### **Committee of Sponsoring Organizations Framework**

14. In the United States, the Committee of Sponsoring Organizations ("COSO") of the Treadway Commission has published *Internal Control—Integrated Framework*. Known as the COSO report, it provides a suitable and available framework for purposes of management's assessment. For that reason, the performance and reporting directions in this standard are based on the COSO framework. Other suitable frameworks have been published in other countries and may be developed in the future. Such other suitable frameworks may be used in an audit of internal control over financial reporting. Although different frameworks may not contain exactly the same elements as COSO, they should have elements that encompass, in general, all the themes in COSO. Therefore, the auditor should be able to apply the concepts and guidance in this standard in a reasonable manner.

15. The COSO framework identifies three primary objectives of internal control: efficiency and effectiveness of operations, financial reporting, and compliance with laws and regulations. The COSO perspective on internal control over financial reporting does not ordinarily include the other two objectives of internal control, which are the effectiveness and efficiency of operations and compliance with laws and regulations. However, the controls that management designs and implements may achieve more than one objective. Also, operations and compliance with laws and regulations directly related to the presentation of and required disclosures in financial statements are encompassed in internal control over financial reporting. Additionally, not all controls relevant to financial reporting are accounting controls. Accordingly, all controls that could materially affect financial reporting, including controls that focus primarily on the effectiveness and efficiency of operations or compliance with laws and regulations and also have a material effect on the reliability of financial reporting, are a part of internal control over financial reporting. More information about the COSO framework is included in the COSO report and in AU sec. 319, *Consideration of Internal Control in a Financial Statement Audit*.<sup>3</sup>

<sup>3</sup> The Board adopted the generally accepted auditing standards, as described in the AICPA Auditing Standards Board's ("ASB") Statement on Auditing Standards No. 95, *Generally Accepted Auditing Standards*, as in existence on April 16, 2003, on an initial, transitional basis. The Statements on Auditing Standards promulgated by the ASB have been codified into the AICPA *Professional Standards*, Volume 1, as AU sections

The COSO report also discusses special considerations for internal control over financial reporting for small and medium-sized companies.

#### **Inherent Limitations in Internal Control Over Financial Reporting**

16. Internal control over financial reporting cannot provide absolute assurance of achieving financial reporting objectives because of its inherent limitations. Internal control over financial reporting is a process that involves human diligence and compliance and is subject to lapses in judgment and breakdowns resulting from human failures. Internal control over financial reporting also can be circumvented by collusion or improper management override. Because of such limitations, there is a risk that material misstatements may not be prevented or detected on a timely basis by internal control over financial reporting. However, these inherent limitations are known features of the financial reporting process. Therefore, it is possible to design into the process safeguards to reduce, though not eliminate, this risk.

#### **The Concept of Reasonable Assurance**

17. Management's assessment of the effectiveness of internal control over financial reporting is expressed at the level of *reasonable assurance*. The concept of reasonable assurance is built into the definition of internal control over financial reporting and also is integral to the auditor's opinion.<sup>4</sup> Reasonable assurance includes the understanding that there is a remote likelihood that material misstatements will not be prevented or detected on a timely basis. Although not absolute assurance, reasonable assurance is, nevertheless, a high level of assurance.

18. Just as there are inherent limitations on the assurance that effective internal control over financial reporting can provide, as discussed in paragraph 16, there are limitations on the amount of assurance the auditor can obtain as a result of performing his or her audit of internal control over financial reporting. Limitations arise because an audit is conducted on a test basis and requires the exercise of professional judgment. Nevertheless, the audit of internal control over financial

100 through 900. References in this standard to AU sections refer to those generally accepted auditing standards, as adopted on an interim basis in PCAOB Rule 3200T.

<sup>4</sup> See *Final Rule: Management's Reports on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports*, Securities and Exchange Commission Release No. 33-8238 (June 5, 2003) [68 FR 36636] for further discussion of reasonable assurance.

reporting includes obtaining an understanding of internal control over financial reporting, testing and evaluating the design and operating effectiveness of internal control over financial reporting, and performing such other procedures as the auditor considers necessary to obtain reasonable assurance about whether internal control over financial reporting is effective.

19. There is no difference in the level of work performed or assurance obtained by the auditor when expressing an opinion on management's assessment of effectiveness or when expressing an opinion directly on the effectiveness of internal control over financial reporting. In either case, the auditor must obtain sufficient evidence to provide a reasonable basis for his or her opinion and the use and evaluation of management's assessment is inherent in expressing either opinion.

**Note:** The auditor's report on internal control over financial reporting does not relieve management of its responsibility for assuring users of its financial reports about the effectiveness of internal control over financial reporting.

#### **Management's Responsibilities in an Audit of Internal Control Over Financial Reporting**

20. For the auditor to satisfactorily complete an audit of internal control over financial reporting, management must do the following:<sup>5</sup>

- a. Accept responsibility for the effectiveness of the company's internal control over financial reporting;
- b. Evaluate the effectiveness of the company's internal control over financial reporting using suitable control criteria;
- c. Support its evaluation with sufficient evidence, including documentation; and
- d. Present a written assessment of the effectiveness of the company's internal control over financial reporting as of the end of the company's most recent fiscal year.

21. If the auditor concludes that management has not fulfilled the responsibilities enumerated in the preceding paragraph, the auditor should communicate, in writing, to management and the audit committee that the audit of internal control over financial reporting cannot be satisfactorily completed and that he or she is required to disclaim an opinion. Paragraphs 40 through 46 provide

information for the auditor about evaluating management's process for assessing internal control over financial reporting.

#### **Materiality Considerations in an Audit of Internal Control Over Financial Reporting**

22. The auditor should apply the concept of materiality in an audit of internal control over financial reporting at both the financial-statement level and at the individual account-balance level. The auditor uses materiality at the financial-statement level in evaluating whether a deficiency, or combination of deficiencies, in controls is a significant deficiency or a material weakness. Materiality at both the financial-statement level and the individual account-balance level is relevant to planning the audit and designing procedures. Materiality at the account-balance level is necessarily lower than materiality at the financial-statement level.

23. The same conceptual definition of materiality that applies to financial reporting applies to information on internal control over financial reporting, including the relevance of both quantitative and qualitative considerations.<sup>6</sup>

- The quantitative considerations are essentially the same as in an audit of financial statements and relate to whether misstatements that would not be prevented or detected by internal control over financial reporting, individually or collectively, have a quantitatively material effect on the financial statements.
- The qualitative considerations apply to evaluating materiality with respect to the financial statements and to additional factors that relate to the perceived needs of reasonable persons who will rely on the information. Paragraph 6 describes some qualitative considerations.

#### **Fraud Considerations in an Audit of Internal Control Over Financial Reporting**

24. The auditor should evaluate all controls specifically intended to address the risks of fraud that have at least a reasonably possible likelihood of having a material effect on the company's financial statements. These controls may be a part of any of the five components of internal control over financial reporting, as discussed in paragraph 49. Controls related to the prevention and detection of fraud often

have a pervasive effect on the risk of fraud. Such controls include, but are not limited to, the:

- Controls restraining misappropriation of company assets that could result in a material misstatement of the financial statements;
- Company's risk assessment processes;
- Code ethics/conduct provisions, especially those related to conflicts of interest, related party transactions, illegal acts, and the monitoring of the code by management and the audit committee or board;
- Adequacy of the internal audit activity and whether the internal audit function reports directly to the audit committee, as well as the extent of the audit committee's involvement and interaction with internal audit; and
- Adequacy of the company's procedures for handling complaints and for accepting confidential submissions of concerns about questionable accounting or auditing matters.

25. Part of management's responsibility when designing a company's internal control over financial reporting is to design and implement programs and controls to prevent, deter, and detect fraud. Management, along with those who have responsibility for oversight of the financial reporting process (such as the audit committee), should set the proper tone; create and maintain a culture of honesty and high ethical standards; and establish appropriate controls to prevent, deter, and detect fraud. When management and those responsible for the oversight of the financial reporting process fulfill those responsibilities, the opportunities to commit fraud can be reduced significantly.

26. In an audit of internal control over financial reporting, the auditor's evaluation of controls is interrelated with the auditor's evaluation of controls in a financial statement audit, as required by AU sec. 316, *Consideration of Fraud in a Financial Statement Audit*. Often, controls identified and evaluated by the auditor during the audit of internal control over financial reporting also address or mitigate fraud risks, which the auditor is required to consider in a financial statement audit. If the auditor identifies deficiencies in controls designed to prevent and detect fraud during the audit of internal control over financial reporting, the auditor should alter the nature, timing, or extent of procedures to be performed during the financial statement audit to be responsive to such deficiencies, as provided in paragraphs .44 and .45 of AU sec. 316.

<sup>5</sup> Management is required to fulfill these responsibilities. See Items 308(a) and (c) of Regulation S-B and S-K, 17 CFR 228.308 (a) and (c) and 229.308 (a) and (c), respectively.

<sup>6</sup> AU sec. 312, *Audit Risk and Materiality in Conducting an Audit*, provides additional explanation of materiality.

## Performing an Audit of Internal Control Over Financial Reporting

27. In an audit of internal control over financial reporting, the auditor must obtain sufficient competent evidence about the design and operating effectiveness of controls over all relevant financial statement assertions related to all significant accounts and disclosures in the financial statements. The auditor must plan and perform the audit to obtain reasonable assurance that deficiencies that, individually or in the aggregate, would represent material weaknesses are identified. Thus, the audit is not designed to detect deficiencies in internal control over financial reporting that, individually or in the aggregate, are less severe than a material weakness. Because of the potential significance of the information obtained during the audit of the financial statements to the auditor's conclusions about the effectiveness of internal control over financial reporting, the auditor cannot audit internal control over financial reporting without also auditing the financial statements.

**Note:** However, the auditor may audit the financial statements without also auditing internal control over financial reporting, for example, in the case of certain initial public offerings by a company. See the discussion beginning at paragraph 145 for more information about the importance of auditing both internal control over financial reporting as well as the financial statements when the auditor is engaged to audit internal control over financial reporting.

28. The auditor must adhere to the general standards (See paragraphs 30 through 36) and fieldwork and reporting standards (See paragraph 37) in performing an audit of a company's internal control over financial reporting. This involves the following:

- a. Planning the engagement;
- b. Evaluating management's assessment process;
- c. Obtaining an understanding of internal control over financial reporting;
- d. Testing and evaluating design effectiveness of internal control over financial reporting;
- e. Testing and evaluating operating effectiveness of internal control over financial reporting; and
- f. Forming an opinion on the effectiveness of internal control over financial reporting.

29. Even though some requirements of this standard are set forth in a manner that suggests a sequential process, auditing internal control over financial reporting involves a process of gathering, updating, and analyzing information. Accordingly, the auditor may perform some of the procedures and evaluations described in this

section on "Performing an Audit of Internal Control Over Financial Reporting" concurrently.

## Applying General, Fieldwork, and Reporting Standards

30. The general standards (See AU sec. 150, *Generally Accepted Auditing Standards*) are applicable to an audit of internal control over financial reporting. These standards require technical training and proficiency as an auditor, independence in fact and appearance, and the exercise of due professional care, including professional skepticism.

31. *Technical Training and Proficiency.* To perform an audit of internal control over financial reporting, the auditor should have competence in the subject matter of internal control over financial reporting.

32. *Independence.* The applicable requirements of independence are largely predicated on four basic principles: (1) An auditor must not act as management or as an employee of the audit client, (2) an auditor must not audit his or her own work, (3) an auditor must not serve in a position of being an advocate for his or her client, and (4) an auditor must not have mutual or conflicting interests with his or her audit client.<sup>7</sup> If the auditor were to design or implement controls, that situation would place the auditor in a management role and result in the auditor auditing his or her own work. These requirements, however, do not preclude the auditor from making substantive recommendations as to how management may improve the design or operation of the company's internal controls as a by-product of an audit.

33. The auditor must not accept an engagement to provide internal control-related services to an issuer for which the auditor also audits the financial statements unless that engagement has been specifically pre-approved by the audit committee. For any internal control services the auditor provides, management must be actively involved and cannot delegate responsibility for these matters to the auditor. Management's involvement must be substantive and extensive. Management's acceptance of responsibility for documentation and testing performed by the auditor does not by itself satisfy the independence requirements.

34. Maintaining independence, in fact and appearance, requires careful attention, as is the case with all independence issues when work concerning internal control over

financial reporting is performed. Unless the auditor and the audit committee are diligent in evaluating the nature and extent of services provided, the services might violate basic principles of independence and cause an impairment of independence in fact or appearance.

35. The independent auditor and the audit committee have significant and distinct responsibilities for evaluating whether the auditor's services impair independence in fact or appearance. The test for independence in fact is whether the activities would impede the ability of anyone on the engagement team or in a position to influence the engagement team from exercising objective judgment in the audits of the financial statements or internal control over financial reporting. The test for independence in appearance is whether a reasonable investor, knowing all relevant facts and circumstances, would perceive an auditor as having interests which could jeopardize the exercise of objective and impartial judgments on all issues encompassed within the auditor's engagement.

36. *Due Professional Care.* The auditor must exercise due professional care in an audit of internal control over financial reporting. One important tenet of due professional care is exercising professional skepticism. In an audit of internal control over financial reporting, exercising professional skepticism involves essentially the same considerations as in an audit of financial statements, that is, it includes a critical assessment of the work that management has performed in evaluating and testing controls.

37. *Fieldwork and Reporting Standards.* This standard establishes the fieldwork and reporting standards applicable to an audit of internal control over financial reporting.

38. The concept of materiality, as discussed in paragraphs 22 and 23, underlies the application of the general and fieldwork standards.

## Planning the Engagement

39. The audit of internal control over financial reporting should be properly planned and assistants, if any, are to be properly supervised. When planning the audit of internal control over financial reporting, the auditor should evaluate how the following matters will affect the auditor's procedures:

- Knowledge of the company's internal control over financial reporting obtained during other engagements.
- Matters affecting the industry in which the company operates, such as financial reporting practices, economic conditions, laws and regulations, and technological changes.

<sup>7</sup> See the Preliminary Note of Rule 2-01 of Regulation S-X, 17 CFR 210.2-01.

- Matters relating to the company's business, including its organization, operating characteristics, capital structure, and distribution methods.
- The extent of recent changes, if any, in the company, its operations, or its internal control over financial reporting.
- Management's process for assessing the effectiveness of the company's internal control over financial reporting based upon control criteria.
- Preliminary judgments about materiality, risk, and other factors relating to the determination of material weaknesses.
- Control deficiencies previously communicated to the audit committee or management.
- Legal or regulatory matters of which the company is aware.
- The type and extent of available evidence related to the effectiveness of the company's internal control over financial reporting.
- Preliminary judgments about the effectiveness of internal control over financial reporting.
- The number of significant business locations or units, including management's documentation and monitoring of controls over such locations or business units. (Appendix B, paragraphs B1 through B17, discusses factors the auditor should evaluate to determine the locations at which to perform auditing procedures.)

#### *Evaluating Management's Assessment Process*

40. The auditor must obtain an understanding of, and evaluate, management's process for assessing the effectiveness of the company's internal control over financial reporting. When obtaining the understanding, the auditor should determine whether management has addressed the following elements:

- Determining which controls should be tested, including controls over all relevant assertions related to all significant accounts and disclosures in the financial statements. Generally, such controls include:
  - Controls over initiating, authorizing, recording, processing, and reporting significant accounts and disclosures and related assertions embodied in the financial statements.
  - Controls over the selection and application of accounting policies that are in conformity with generally accepted accounting principles.
  - Antifraud programs and controls.
  - Controls, including information technology general controls, on which other controls are dependent.
  - Controls over significant nonroutine and nonsystematic transactions, such

as accounts involving judgments and estimates.

- Company level controls (as described in paragraph 53), including:
  - The control environment and
  - Controls over the period-end financial reporting process, including controls over procedures used to enter transaction totals into the general ledger; to initiate, authorize, record, and process journal entries in the general ledger; and to record recurring and nonrecurring adjustments to the financial statements (for example, consolidating adjustments, report combinations, and reclassifications).

**Note:** References to the period-end financial reporting process in this standard refer to the preparation of both annual and quarterly financial statements.

- Evaluating the likelihood that failure of the control could result in a misstatement, the magnitude of such a misstatement, and the degree to which other controls, if effective, achieve the same control objectives.
- Determining the locations or business units to include in the evaluation for a company with multiple locations or business units (See paragraphs B1 through B17).
- Evaluating the design effectiveness of controls.
- Evaluating the operating effectiveness of controls based on procedures sufficient to assess their operating effectiveness.

Examples of such procedures include testing of the controls by internal audit, testing of controls by others under the direction of management, using a service organization's reports (See paragraphs B18 through B29), inspection of evidence of the application of controls, or testing by means of a self-assessment process, some of which might occur as part of management's ongoing monitoring activities. Inquiry alone is not adequate to complete this evaluation. To evaluate the effectiveness of the company's internal control over financial reporting, management must have evaluated controls over all relevant assertions related to all significant accounts and disclosures.

- Determining the deficiencies in internal control over financial reporting that are of such a magnitude and likelihood of occurrence that they constitute significant deficiencies or material weaknesses.
- Communicating findings to the auditor and to others, if applicable.
- Evaluating whether findings are reasonable and support management's assessment.

41. As part of the understanding and evaluation of management's process, the auditor should obtain an understanding of the results of procedures performed by others. Others include internal audit and third parties working under the direction of management, including other auditors and accounting professionals engaged to perform procedures as a basis for management's assessment. Inquiry of management and others is the beginning point for obtaining an understanding of internal control over financial reporting, but inquiry alone is not adequate for reaching a conclusion on any aspect of internal control over financial reporting effectiveness.

**Note:** Management cannot use the auditor's procedures as part of the basis for its assessment of the effectiveness of internal control over financial reporting.

#### *42. Management's Documentation.*

When determining whether management's documentation provides reasonable support for its assessment, the auditor should evaluate whether such documentation includes the following:

- The design of controls over all relevant assertions related to all significant accounts and disclosures in the financial statements. The documentation should include the five components of internal control over financial reporting as discussed in paragraph 49, including the control environment and company-level controls as described in paragraph 53;
  - Information about how significant transactions are initiated, authorized, recorded, processed and reported;
  - Sufficient information about the flow of transactions to identify the points at which material misstatements due to error or fraud could occur;
  - Controls designed to prevent or detect fraud, including who performs the controls and the related segregation of duties;
  - Controls over the period-end financial reporting process;
  - Controls over safeguarding of assets (See paragraphs C1 through C6); and
  - The results of management's testing and evaluation.

43. Documentation might take many forms, such as paper, electronic files, or other media, and can include a variety of information, including policy manuals, process models, flowcharts, job descriptions, documents, and forms. The form and extent of documentation will vary depending on the size, nature, and complexity of the company.

44. Documentation of the design of controls over relevant assertions related to significant accounts and disclosures

is evidence that controls related to management's assessment of the effectiveness of internal control over financial reporting, including changes to those controls, have been identified, are capable of being communicated to those responsible for their performance, and are capable of being monitored by the company. Such documentation also provides the foundation for appropriate communication concerning responsibilities for performing controls and for the company's evaluation of and monitoring of the effective operation of controls.

45. Inadequate documentation of the design of controls over relevant assertions related to significant accounts and disclosures is a deficiency in the company's internal control over financial reporting. As discussed in paragraph 138, the auditor should evaluate this documentation deficiency. The auditor might conclude that the deficiency is only a deficiency, or that the deficiency represents a significant deficiency or a material weakness. In evaluating the deficiency as to its significance, the auditor should determine whether management can demonstrate the monitoring component of internal control over financial reporting.

46. Inadequate documentation also could cause the auditor to conclude that there is a limitation on the scope of the engagement.

#### *Obtaining an Understanding of Internal Control Over Financial Reporting*

47. The auditor should obtain an understanding of the design of specific controls by applying procedures that include:

- Making inquiries of appropriate management, supervisory, and staff personnel;
- Inspecting company documents;
- Observing the application of specific controls; and
- Tracing transactions through the information system relevant to financial reporting.

48. The auditor could also apply additional procedures to obtain an understanding of the design of specific controls.

49. The auditor must obtain an understanding of the design of controls related to each component of internal control over financial reporting, as discussed below.

• *Control Environment.* Because of the pervasive effect of the control environment on the reliability of financial reporting, the auditor's preliminary judgment about its effectiveness often influences the nature, timing, and extent of the tests of

operating effectiveness considered necessary. Weaknesses in the control environment should cause the auditor to alter the nature, timing, or extent of tests of operating effectiveness that otherwise should have been performed in the absence of the weaknesses.

• *Risk Assessment.* When obtaining an understanding of the company's risk assessment process, the auditor should evaluate whether management has identified the risks of material misstatement in the significant accounts and disclosures and related assertions of the financial statements and has implemented controls to prevent or detect errors or fraud that could result in material misstatements. For example, the risk assessment process should address how management considers the possibility of unrecorded transactions or identifies and analyzes significant estimates recorded in the financial statements. Risks relevant to reliable financial reporting also relate to specific events or transactions.

• *Control Activities.* The auditor's understanding of control activities relates to the controls that management has implemented to prevent or detect errors or fraud that could result in material misstatement in the accounts and disclosures and related assertions of the financial statements. For the purposes of evaluating the effectiveness of internal control over financial reporting, the auditor's understanding of control activities encompasses a broader range of accounts and disclosures than what is normally obtained for the financial statement audit.

• *Information and Communication.* The auditor's understanding of management's information and communication involves understanding the same systems and processes that he or she addresses in an audit of financial statements. In addition, this understanding includes a greater emphasis on comprehending the safeguarding controls and the processes for authorization of transactions and the maintenance of records, as well as the period-end financial reporting process (discussed further beginning at paragraph 76).

• *Monitoring.* The auditor's understanding of management's monitoring of controls extends to and includes its monitoring of all controls, including control activities, which management has identified and designed to prevent or detect material misstatement in the accounts and disclosures and related assertions of the financial statements.

50. Some controls (such as company-level controls, described in paragraph 53) might have a pervasive effect on the

achievement of many overall objectives of the control criteria. For example, information technology general controls over program development, program changes, computer operations, and access to programs and data help ensure that specific controls over the processing of transactions are operating effectively. In contrast, other controls are designed to achieve specific objectives of the control criteria. For example, management generally establishes specific controls, such as accounting for all shipping documents, to ensure that all valid sales are recorded.

51. The auditor should focus on combinations of controls, in addition to specific controls in isolation, in assessing whether the objectives of the control criteria have been achieved. The absence or inadequacy of a specific control designed to achieve the objectives of a specific criterion might not be a deficiency if other controls specifically address the same criterion. Further, when one or more controls achieve the objectives of a specific criterion, the auditor might not need to evaluate other controls designed to achieve those same objectives.

52. *Identifying Company-Level Controls.* Controls that exist at the company-level often have a pervasive impact on controls at the process, transaction, or application level. For that reason, as a practical consideration, it may be appropriate for the auditor to test and evaluate the design effectiveness of company-level controls first, because the results of that work might affect the way the auditor evaluates the other aspects of internal control over financial reporting.

53. Company-level controls are controls such as the following:

- Controls within the control environment, including tone at the top, the assignment of authority and responsibility, consistent policies and procedures, and company-wide programs, such as codes of conduct and fraud prevention, that apply to all locations and business units (See paragraphs 113 through 115 for further discussion);
- Management's risk assessment process;
- Centralized processing and controls, including shared service environments;
- Controls to monitor results of operations;
- Controls to monitor other controls, including activities of the internal audit function, the audit committee, and self-assessment programs;
- The period-end financial reporting process; and

- Board-approved policies that address significant business control and risk management practices.

**Note:** The controls listed above are not intended to be a complete list of company-level controls nor is a company required to have all the controls in the list to support its assessment of effective company-level controls. However, ineffective company-level controls are a deficiency that will affect the scope of work performed, particularly when a company has multiple locations or business units, as described in Appendix B.

54. Testing company-level controls alone is not sufficient for the purpose of expressing an opinion on the effectiveness of a company's internal control over financial reporting.

55. *Evaluating the Effectiveness of the Audit Committee's Oversight of the Company's External Financial Reporting and Internal Control Over Financial Reporting.* The company's audit committee plays an important role within the control environment and monitoring components of internal control over financial reporting. Within the control environment, the existence of an effective audit committee helps to set a positive tone at the top. Within the monitoring component, an effective audit committee challenges the company's activities in the financial arena.

**Note:** Although the audit committee plays an important role within the control environment and monitoring components of internal control over financial reporting, management is responsible for maintaining effective internal control over financial reporting. This standard does not suggest that this responsibility has been transferred to the audit committee.

**Note:** If no such committee exists with respect to the company, all references to the audit committee in this standard apply to the entire board of directors of the company.<sup>8</sup> The auditor should be aware that companies whose securities are not listed on a national securities exchange or an automated inter-dealer quotation system of a national securities association (such as the New York Stock Exchange, American Stock Exchange, or NASDAQ) may not be required to have independent directors for their audit committees. In this case, the auditor should not consider the lack of independent directors at these companies indicative, by itself, of a control deficiency. Likewise, the independence requirements of Securities Exchange Act Rule 10A-3<sup>9</sup> are not applicable to the listing of non-equity securities of a consolidated or at least 50 percent beneficially owned subsidiary of a listed issuer that is subject to the requirements of Securities Exchange Act Rule 10A-3(c)(2).<sup>10</sup> Therefore, the auditor should interpret

references to the audit committee in this standard, as applied to a subsidiary registrant, as being consistent with the provisions of Securities Exchange Act Rule 10A-3(c)(2).<sup>11</sup> Furthermore, for subsidiary registrants, communications required by this standard to be directed to the audit committee should be made to the same committee or equivalent body that pre-approves the retention of the auditor by or on behalf of the subsidiary registrant pursuant to Rule 2-01(c)(7) of Regulation S-X<sup>12</sup> (which might be, for example, the audit committee of the subsidiary registrant, the full board of the subsidiary registrant, or the audit committee of the subsidiary registrant's parent). In all cases, the auditor should interpret the terms "board of directors" and "audit committee" in this standard as being consistent with provisions for the use of those terms as defined in relevant SEC rules.

56. The company's board of directors is responsible for evaluating the performance and effectiveness of the audit committee; this standard does not suggest that the auditor is responsible for performing a separate and distinct evaluation of the audit committee. However, because of the role of the audit committee within the control environment and monitoring components of internal control over financial reporting, the auditor should assess the effectiveness of the audit committee as part of understanding and evaluating those components.

57. The aspects of the audit committee's effectiveness that are important may vary considerably with the circumstances. The auditor focuses on factors related to the effectiveness of the audit committee's oversight of the company's external financial reporting and internal control over financial reporting, such as the independence of the audit committee members from management and the clarity with which the audit committee's responsibilities are articulated (for example, in the audit committee's charter) and how well the audit committee and management understand those responsibilities. The auditor might also consider the audit committee's involvement and interaction with the independent auditor and with internal auditors, as well as interaction with key members of financial management, including the chief financial officer and chief accounting officer.

58. The auditor might also evaluate whether the right questions are raised and pursued with management and the auditor, including questions that indicate an understanding of the critical accounting policies and judgmental accounting estimates, and the

responsiveness to issues raised by the auditor.

59. Ineffective oversight by the audit committee of the company's external financial reporting and internal control over financial reporting should be regarded as at least a significant deficiency and is a strong indicator that a material weakness in internal control over financial reporting exists.

60. *Identifying Significant Accounts.* The auditor should identify significant accounts and disclosures, first at the financial-statement level and then at the account or disclosure-component level. Determining specific controls to test begins by identifying significant accounts and disclosures within the financial statements. When identifying significant accounts, the auditor should evaluate both quantitative and qualitative factors.

61. An account is significant if there is more than a remote likelihood that the account could contain misstatements that individually, or when aggregated with others, could have a material effect on the financial statements, considering the risks of both overstatement and understatement. Other accounts may be significant on a qualitative basis based on the expectations of a reasonable user. For example, investors might be interested in a particular financial statement account even though it is not quantitatively large because it represents an important performance measure.

**Note:** For purposes of determining significant accounts, the assessment as to likelihood should be made without giving any consideration to the effectiveness of internal control over financial reporting.

62. Components of an account balance subject to differing risks (inherent and control) or different controls should be considered separately as potential significant accounts. For instance, inventory accounts often consist of raw materials (purchasing process), work in process (manufacturing process), finished goods (distribution process), and an allowance for obsolescence.

63. In some cases, separate components of an account might be a significant account because of the company's organizational structure. For example, for a company that has a number of separate business units, each with different management and accounting processes, the accounts at each separate business unit are considered individually as potential significant accounts.

64. An account also may be considered significant because of the exposure to unrecognized obligations

<sup>8</sup> See 15 U.S.C. 78c(a)58 and 15 U.S.C. 7201(a)(3).

<sup>9</sup> See 17 CFR 240.10A-3.

<sup>10</sup> See 17 CFR 240.10A-3(c)(2).

<sup>11</sup> See 17 CFR 240.10A-3(c)(2).

<sup>12</sup> See 17 CFR 210.2-01(c)(7).

represented by the account. For example, loss reserves related to a self-insurance program or unrecorded contractual obligations at a construction contracting subsidiary may have historically been insignificant in amount, yet might represent a more than remote likelihood of material misstatement due to the existence of material unrecorded claims.

65. When deciding whether an account is significant, it is important for the auditor to evaluate both quantitative and qualitative factors, including the:

- Size and composition of the account;
- Susceptibility of loss due to errors or fraud;
- Volume of activity, complexity, and homogeneity of the individual transactions processed through the account;
- Nature of the account (for example, suspense accounts generally warrant greater attention);
- Accounting and reporting complexities associated with the account;
- Exposure to losses represented by the account (for example, loss accruals related to a consolidated construction contracting subsidiary);
- Likelihood (or possibility) of significant contingent liabilities arising from the activities represented by the account;
- Existence of related party transactions in the account; and
- Changes from the prior period in account characteristics (for example, new complexities or subjectivity or new types of transactions).

66. For example, in a financial statement audit, the auditor might not consider the fixed asset accounts significant when there is a low volume of transactions and when inherent risk is assessed as low, even though the balances are material to the financial statements. Accordingly, he or she might decide to perform only substantive procedures on such balances. In an audit of internal control over financial reporting, however, such accounts are significant accounts because of their materiality to the financial statements.

67. As another example, the auditor of the financial statements of a financial institution might not consider trust accounts significant to the institution's financial statements because such accounts are not included in the institution's balance sheet and the associated fee income generated by trust activities is not material. However, in determining whether trust accounts are a significant account for purposes of the audit of internal control over financial

reporting, the auditor should assess whether the activities of the trust department are significant to the institution's financial reporting, which also would include considering the contingent liabilities that could arise if a trust department failed to fulfill its fiduciary responsibilities (for example, if investments were made that were not in accordance with stated investment policies). When assessing the significance of possible contingent liabilities, consideration of the amount of assets under the trust department's control may be useful. For this reason, an auditor who has not considered trust accounts significant accounts for purposes of the financial statement audit might determine that they are significant for purposes of the audit of internal control over financial reporting.

68. Identifying Relevant Financial Statement Assertions. For each significant account, the auditor should determine the relevance of each of these financial statement assertions:<sup>13</sup>

- Existence or occurrence;
- Completeness;
- Valuation or allocation;
- Rights and obligations; and
- Presentation and disclosure.

69. To identify relevant assertions, the auditor should determine the source of likely potential misstatements in each significant account. In determining whether a particular assertion is relevant to a significant account balance or disclosure, the auditor should evaluate:

- The nature of the assertion;
- The volume of transactions or data related to the assertion; and
- The nature and complexity of the systems, including the use of information technology by which the company processes and controls information supporting the assertion.

70. *Relevant assertions* are assertions that have a meaningful bearing on whether the account is fairly stated. For example, valuation may not be relevant to the cash account unless currency translation is involved; however, existence and completeness are always relevant. Similarly, valuation may not be relevant to the gross amount of the accounts receivable balance, but is relevant to the related allowance accounts. Additionally, the auditor might, in some circumstances, focus on the presentation and disclosure assertion separately in connection with the period-end financial reporting process.

<sup>13</sup> See AU sec. 326, *Evidential Matter*, which provides additional information on financial statement assertions.

71. *Identifying Significant Processes and Major Classes of Transactions.* The auditor should identify each significant process over each major class of transactions affecting significant accounts or groups of accounts. Major classes of transactions are those classes of transactions that are significant to the company's financial statements. For example, at a company whose sales may be initiated by customers through personal contact in a retail store or electronically through use of the internet, these types of sales would be two major classes of transactions within the sales process if they were both significant to the company's financial statements. As another example, at a company for which fixed assets is a significant account, recording depreciation expense would be a major class of transactions.

72. Different types of major classes of transactions have different levels of inherent risk associated with them and require different levels of management supervision and involvement. For this reason, the auditor might further categorize the identified major classes of transactions by transaction type: routine, nonroutine, and estimation.

• Routine transactions are recurring financial activities reflected in the accounting records in the normal course of business (for example, sales, purchases, cash receipts, cash disbursements, payroll).

• Nonroutine transactions are activities that occur only periodically (for example, taking physical inventory, calculating depreciation expense, adjusting for foreign currencies). A distinguishing feature of nonroutine transactions is that data involved are generally not part of the routine flow of transactions.

• Estimation transactions are activities that involve management judgments or assumptions in formulating account balances in the absence of a precise means of measurement (for example, determining the allowance for doubtful accounts, establishing warranty reserves, assessing assets for impairment).

73. Most processes involve a series of tasks such as capturing input data, sorting and merging data, making calculations, updating transactions and master files, generating transactions, and summarizing and displaying or reporting data. The processing procedures relevant for the auditor to understand the flow of transactions generally are those activities required to initiate, authorize, record, process and report transactions. Such activities include, for example, initially recording sales orders, preparing shipping

documents and invoices, and updating the accounts receivable master file. The relevant processing procedures also include procedures for correcting and reprocessing previously rejected transactions and for correcting erroneous transactions through adjusting journal entries.

74. For each significant process, the auditor should:

- Understand the flow of transactions, including how transactions are initiated, authorized, recorded, processed, and reported.
- Identify the points within the process at which a misstatement—including a misstatement due to fraud—related to each relevant financial statement assertion could arise.
- Identify the controls that management has implemented to address these potential misstatements.
- Identify the controls that management has implemented over the prevention or timely detection of unauthorized acquisition, use, or disposition of the company's assets.

**Note:** The auditor frequently obtains the understanding and identifies the controls described above as part of his or her performance of walkthroughs (as described beginning in paragraph 79).

75. The nature and characteristics of a company's use of information technology in its information system affect the company's internal control over financial reporting. AU sec. 319, *Consideration of Internal Control in a Financial Statement Audit*, paragraphs .16 through .20, .30 through .32, and .77 through .79, discuss the effect of information technology on internal control over financial reporting.

76. *Understanding the Period-end Financial Reporting Process.* The period-end financial reporting process includes the following:

- The procedures used to enter transaction totals into the general ledger;
- The procedures used to initiate, authorize, record, and process journal entries in the general ledger;
- Other procedures used to record recurring and nonrecurring adjustments to the annual and quarterly financial statements, such as consolidating adjustments, report combinations, and classifications; and
- Procedures for drafting annual and quarterly financial statements and related disclosures.

77. As part of understanding and evaluating the period-end financial reporting process, the auditor should evaluate:

- The inputs, procedures performed, and outputs of the processes the

company uses to produce its annual and quarterly financial statements;

- The extent of information technology involvement in each period-end financial reporting process element;
- Who participates from management;
- The number of locations involved;
- Types of adjusting entries (for example, standard, nonstandard, eliminating, and consolidating); and
- The nature and extent of the oversight of the process by appropriate parties, including management, the board of directors, and the audit committee.

78. The period-end financial reporting process is always a significant process because of its importance to financial reporting and to the auditor's opinions on internal control over financial reporting and the financial statements. The auditor's understanding of the company's period-end financial reporting process and how it interrelates with the company's other significant processes assists the auditor in identifying and testing controls that are the most relevant to financial statement risks.

79. *Performing Walkthroughs.* The auditor should perform at least one walkthrough for each major class of transactions (as identified in paragraph 71). In a walkthrough, the auditor traces a transaction from origination through the company's information systems until it is reflected in the company's financial reports. Walkthroughs provide the auditor with evidence to:

- Confirm the auditor's understanding of the process flow of transactions;
- Confirm the auditor's understanding of the design of controls identified for all five components of internal control over financial reporting, including those related to the prevention or detection of fraud;
- Confirm that the auditor's understanding of the process is complete by determining whether all points in the process at which misstatements related to each relevant financial statement assertion that could occur have been identified;
- Evaluate the effectiveness of the design of controls; and
- Confirm whether controls have been placed in operation.

**Note:** The auditor can often gain an understanding of the transaction flow, identify and understand controls, and conduct the walkthrough simultaneously.

80. The auditor's walkthroughs should encompass the entire process of initiating, authorizing, recording, processing, and reporting individual transactions and controls for each of the

significant processes identified, including controls intended to address the risk of fraud. During the walkthrough, at each point at which important processing procedures or controls occur, the auditor should question the company's personnel about their understanding of what is required by the company's prescribed procedures and controls and determine whether the processing procedures are performed as originally understood and on a timely basis. (Controls might not be performed regularly but still be timely.) During the walkthrough, the auditor should be alert for exceptions to the company's prescribed procedures and controls.

81. While performing a walkthrough, the auditor should evaluate the quality of the evidence obtained and perform walkthrough procedures that produce a level of evidence consistent with the objectives listed in paragraph 79. Rather than reviewing copies of documents and making inquiries of a single person at the company, the auditor should follow the process flow of actual transactions using the same documents and information technology that company personnel use and make inquiries of relevant personnel involved in significant aspects of the process or controls. To corroborate information at various points in the walkthrough, the auditor might ask personnel to describe their understanding of the previous and succeeding processing or control activities and to demonstrate what they do. In addition, inquiries should include follow-up questions that could help identify the abuse of controls or indicators of fraud. Examples of follow-up inquiries include asking personnel:

- What they do when they find an error or what they are looking for to determine if there is an error (rather than simply asking them if they perform listed procedures and controls); what kind of errors they have found; what happened as a result of finding the errors, and how the errors were resolved. If the person being interviewed has never found an error, the auditor should evaluate whether that situation is due to good preventive controls or whether the individual performing the control lacks the necessary skills.
- Whether they have been asked to override the process or controls, and if so, to describe the situation, why it occurred, and what happened.

82. During the period under audit, when there have been significant changes in the process flow of transactions, including the supporting computer applications, the auditor should evaluate the nature of the

change(s) and the effect on related accounts to determine whether to walk through transactions that were processed both before and after the change.

**Note:** Unless significant changes in the process flow of transactions, including the supporting computer applications, make it more efficient for the auditor to prepare new documentation of a walkthrough, the auditor may carry his or her documentation forward each year, after updating it for any changes that have taken place.

83. *Identifying Controls to Test.* The auditor should obtain evidence about the effectiveness of controls (either by performing tests of controls himself or herself, or by using the work of others)<sup>14</sup> for all relevant assertions related to all significant accounts and disclosures in the financial statements. After identifying significant accounts, relevant assertions, and significant processes, the auditor should evaluate the following to identify the controls to be tested:

- Points at which errors or fraud could occur;
- The nature of the controls implemented by management;
- The significance of each control in achieving the objectives of the control criteria and whether more than one control achieves a particular objective or whether more than one control is necessary to achieve a particular objective; and
- The risk that the controls might not be operating effectively. Factors that affect whether the control might not be operating effectively include the following:

- Whether there have been changes in the volume or nature of transactions that might adversely affect control design or operating effectiveness;
- Whether there have been changes in the design of controls;
- The degree to which the control relies on the effectiveness of other controls (for example, the control environment or information technology general controls);
- Whether there have been changes in key personnel who perform the control or monitor its performance;
- Whether the control relies on performance by an individual or is automated; and
- The complexity of the control.

84. The auditor should clearly link individual controls with the significant accounts and assertions to which they relate.

85. The auditor should evaluate whether to test preventive controls,

detective controls, or a combination of both for individual relevant assertions related to individual significant accounts. For instance, when performing tests of preventive and detective controls, the auditor might conclude that a deficient preventive control could be compensated for by an effective detective control and, therefore, not result in a significant deficiency or material weakness. For example, a monthly reconciliation control procedure, which is a detective control, might detect an out-of-balance situation resulting from an unauthorized transaction being initiated due to an ineffective authorization procedure, which is a preventive control. When determining whether the detective control is effective, the auditor should evaluate whether the detective control is sufficient to achieve the control objective to which the preventive control relates.

**Note:** Because effective internal control over financial reporting often includes a combination of preventive and detective controls, the auditor ordinarily will test a combination of both.

86. The auditor should apply tests of controls to those controls that are important to achieving each control objective. It is neither necessary to test all controls nor is it necessary to test redundant controls (that is, controls that duplicate other controls that achieve the same objective and already have been tested), unless redundancy is itself a control objective, as in the case of certain computer controls.

87. Appendix B, paragraphs B1 through B17, provide additional direction to the auditor in determining which controls to test when a company has multiple locations or business units. In these circumstances, the auditor should determine significant accounts and their relevant assertions, significant processes, and major classes of transactions based on those that are relevant and significant to the consolidated financial statements. Having made those determinations in relation to the consolidated financial statements, the auditor should then apply the directions in Appendix B.

#### *Testing and Evaluating Design Effectiveness*

88. Internal control over financial reporting is effectively designed when the controls complied with would be expected to prevent or detect errors or fraud that could result in material misstatements in the financial statements. The auditor should determine whether the company has

controls to meet the objectives of the control criteria by:

- Identifying the company's control objectives in each area;
- Identifying the controls that satisfy each objective; and
- Determining whether the controls, if operating properly, can effectively prevent or detect errors or fraud that could result in material misstatements in the financial statements.

89. Procedures the auditor performs to test and evaluate design effectiveness include inquiry, observation, walkthroughs, inspection of relevant documentation, and a specific evaluation of whether the controls are likely to prevent or detect errors or fraud that could result in misstatements if they are operated as prescribed by appropriately qualified persons.

90. The procedures that the auditor performs in evaluating management's assessment process and obtaining an understanding of internal control over financial reporting also provide the auditor with evidence about the design effectiveness of internal control over financial reporting.

91. The procedures the auditor performs to test and evaluate design effectiveness also might provide evidence about operating effectiveness.

#### *Testing and Evaluating Operating Effectiveness*

92. An auditor should evaluate the operating effectiveness of a control by determining whether the control is operating as designed and whether the person performing the control possesses the necessary authority and qualifications to perform the control effectively.

93. *Nature of Tests of Controls.* Tests of controls over operating effectiveness should include a mix of inquiries of appropriate personnel, inspection of relevant documentation, observation of the company's operations, and reperformance of the application of the control. For example, the auditor might observe the procedures for opening the mail and processing cash receipts to test the operating effectiveness of controls over cash receipts. Because an observation is pertinent only at the point in time at which it is made, the auditor should supplement the observation with inquiries of company personnel and inspection of documentation about the operation of such controls at other times. These inquiries might be made concurrently with performing walkthroughs.

94. Inquiry is a procedure that consists of seeking information, both financial and nonfinancial, of knowledgeable persons throughout the

<sup>14</sup> See paragraphs 108 through 126 for additional direction on using the work of others.

company. Inquiry is used extensively throughout the audit and often is complementary to performing other procedures. Inquiries may range from formal written inquiries to informal oral inquiries.

95. Evaluating responses to inquiries is an integral part of the inquiry procedure. Examples of information that inquiries might provide include the skill and competency of those performing the control, the relative sensitivity of the control to prevent or detect errors or fraud, and the frequency with which the control operates to prevent or detect errors or fraud. Responses to inquiries might provide the auditor with information not previously possessed or with corroborative evidence. Alternatively, responses might provide information that differs significantly from other information the auditor obtains (for example, information regarding the possibility of management override of controls). In some cases, responses to inquiries provide a basis for the auditor to modify or perform additional procedures.

96. Because inquiry alone does not provide sufficient evidence to support the operating effectiveness of a control, the auditor should perform additional tests of controls. For example, if the company implements a control activity whereby its sales manager reviews and investigates a report of invoices with unusually high or low gross margins, inquiry of the sales manager as to whether he or she investigates discrepancies would be inadequate. To obtain sufficient evidence about the operating effectiveness of the control, the auditor should corroborate the sales manager's responses by performing other procedures, such as inspecting reports or other documentation used in or generated by the performance of the control, and evaluate whether appropriate actions were taken regarding discrepancies.

97. The nature of the control also influences the nature of the tests of controls the auditor can perform. For example, the auditor might examine documents regarding controls for which documentary evidence exists. However, documentary evidence regarding some aspects of the control environment, such as management's philosophy and operating style, might not exist. In circumstances in which documentary evidence of controls or the performance of controls does not exist and is not expected to exist, the auditor's tests of controls would consist of inquiries of appropriate personnel and observation of company activities. As another example, a signature on a voucher package to indicate that the signer

approved it does not necessarily mean that the person carefully reviewed the package before signing. The package may have been signed based on only a cursory review (or without any review). As a result, the quality of the evidence regarding the effective operation of the control might not be sufficiently persuasive. If that is the case, the auditor should reperform the control (for example, checking prices, extensions, and additions) as part of the test of the control. In addition, the auditor might inquire of the person responsible for approving voucher packages what he or she looks for when approving packages and how many errors have been found within voucher packages. The auditor also might inquire of supervisors whether they have any knowledge of errors that the person responsible for approving the voucher packages failed to detect.

98. *Timing of Tests of Controls.* The auditor must perform tests of controls over a period of time that is adequate to determine whether, as of the date specified in management's report, the controls necessary for achieving the objectives of the control criteria are operating effectively. The period of time over which the auditor performs tests of controls varies with the nature of the controls being tested and with the frequency with which specific controls operate and specific policies are applied. Some controls operate continuously (for example, controls over sales), while others operate only at certain times (for example, controls over the preparation of monthly or quarterly financial statements and controls over physical inventory counts).

99. The auditor's testing of the operating effectiveness of such controls should occur at the time the controls are operating. Controls "as of" a specific date encompass controls that are relevant to the company's internal control over financial reporting "as of" that specific date, even though such controls might not operate until after that specific date. For example, some controls over the period-end financial reporting process normally operate only after the "as of" date. Therefore, if controls over the December 31, 20X4 period-end financial reporting process operate in January 20X5, the auditor should test the control operating in January 20X5 to have sufficient evidence of operating effectiveness "as of" December 31, 20X4.

100. When the auditor reports on the effectiveness of controls "as of" a specific date and obtains evidence about the operating effectiveness of controls at an interim date, he or she should determine what additional evidence to

obtain concerning the operation of the control for the remaining period. In making that determination, the auditor should evaluate:

- The specific controls tested prior to the "as of" date and the results of those tests;
- The degree to which evidence about the operating effectiveness of those controls was obtained;
- The length of the remaining period; and
- The possibility that there have been any significant changes in internal control over financial reporting subsequent to the interim date.

101. For controls over significant nonroutine transactions, controls over accounts or processes with a high degree of subjectivity or judgment in measurement, or controls over the recording of period-end adjustments, the auditor should perform tests of controls closer to or at the "as of" date rather than at an interim date. However, the auditor should balance performing the tests of controls closer to the "as of" date with the need to obtain sufficient evidence of operating effectiveness.

102. Prior to the date specified in management's report, management might implement changes to the company's controls to make them more effective or efficient or to address control deficiencies. In that case, the auditor might not need to evaluate controls that have been superseded. For example, if the auditor determines that the new controls achieve the related objectives of the control criteria and have been in effect for a sufficient period to permit the auditor to assess their design and operating effectiveness by performing tests of controls,<sup>15</sup> he or she will not need to evaluate the design and operating effectiveness of the superseded controls for purposes of expressing an opinion on internal control over financial reporting.

103. As discussed in paragraph 207, however, the auditor must communicate all identified significant deficiencies and material weaknesses in controls to the audit committee in writing. In addition, the auditor should evaluate how the design and operating effectiveness of the superseded controls relates to the auditor's reliance on controls for financial statement audit purposes.

104. *Extent of Tests of Controls.* Each year the auditor must obtain sufficient evidence about whether the company's internal control over financial reporting,

<sup>15</sup> Paragraph 179 provides reporting directions in these circumstances when the auditor has not been able to obtain evidence that the new controls were appropriately designed or have been operating effectively for a sufficient period of time.

including the controls for all internal control components, is operating effectively. This means that each year the auditor must obtain evidence about the effectiveness of controls for all relevant assertions related to all significant accounts and disclosures in the financial statements. The auditor also should vary from year to year the nature, timing, and extent of testing of controls to introduce unpredictability into the testing and respond to changes in circumstances. For example, each year the auditor might test the controls at a different interim period; increase or reduce the number and types of tests performed; or change the combination of procedures used.

105. In determining the extent of procedures to perform, the auditor should design the procedures to provide a high level of assurance that the control being tested is operating effectively. In making this determination, the auditor should assess the following factors:

- *Nature of the control.* The auditor should subject manual controls to more extensive testing than automated controls. In some circumstances, testing a single operation of an automated control may be sufficient to obtain a high level of assurance that the control operated effectively, provided that information technology general controls also are operating effectively. For manual controls, sufficient evidence about the operating effectiveness of the controls is obtained by evaluating multiple operations of the control and the results of each operation. The auditor also should assess the complexity of the controls, the significance of the judgments that must be made in connection with their operation, and the level of competence of the person performing the controls that is necessary for the control to operate effectively. As the complexity and level of judgment increase or the level of competence of the person performing the control decreases, the extent of the auditor's testing should increase.

- *Frequency of operation.* Generally, the more frequently a manual control operates, the more operations of the control the auditor should test. For example, for a manual control that operates in connection with each transaction, the auditor should test multiple operations of the control over a sufficient period of time to obtain a high level of assurance that the control operated effectively. For controls that operate less frequently, such as monthly account reconciliations and controls over the period-end financial reporting process, the auditor may test significantly fewer operations of the

control. However, the auditor's evaluation of each operation of controls operating less frequently is likely to be more extensive. For example, when evaluating the operation of a monthly exception report, the auditor should evaluate whether the judgments made with regard to the disposition of the exceptions were appropriate and adequately supported.

**Note:** When sampling is appropriate and the population of controls to be tested is large, increasing the population size does not proportionately increase the required sample size.

- *Importance of the control.* Controls that are relatively more important should be tested more extensively. For example, some controls may address multiple financial statement assertions, and certain period-end detective controls might be considered more important than related preventive controls. The auditor should test more operations of such controls or, if such controls operate infrequently, the auditor should evaluate each operation of the control more extensively.

106. *Use of Professional Skepticism when Evaluating the Results of Testing.* The auditor must conduct the audit of internal control over financial reporting and the audit of the financial statements with professional skepticism, which is an attitude that includes a questioning mind and a critical assessment of audit evidence. For example, even though a control is performed by the same employee whom the auditor believes performed the control effectively in prior periods, the control may not be operating effectively during the current period because the employee could have become complacent, distracted, or otherwise not be effectively carrying out his or her responsibilities. Also, regardless of any past experience with the entity or the auditor's beliefs about management's honesty and integrity, the auditor should recognize the possibility that a material misstatement due to fraud could be present. Furthermore, professional skepticism requires the auditor to consider whether evidence obtained suggests that a material misstatement due to fraud has occurred. In exercising professional skepticism in gathering and evaluating evidence, the auditor must not be satisfied with less-than-persuasive evidence because of a belief that management is honest.

107. When the auditor identifies exceptions to the company's prescribed control procedures, he or she should determine, using professional skepticism, the effect of the exception on the nature and extent of additional testing that may be appropriate or

necessary and on the operating effectiveness of the control being tested. A conclusion that an identified exception does not represent a control deficiency is appropriate only if evidence beyond what the auditor had initially planned and beyond inquiry supports that conclusion.

#### Using the Work of Others

108. In all audits of internal control over financial reporting, the auditor must perform enough of the testing himself or herself so that the auditor's own work provides the principal evidence for the auditor's opinion. The auditor may, however, use the work of others to alter the nature, timing, or extent of the work he or she otherwise would have performed. For these purposes, the work of others includes relevant work performed by internal auditors, company personnel (in addition to internal auditors), and third parties working under the direction of management or the audit committee that provides information about the effectiveness of internal control over financial reporting.

**Note:** Because the amount of work related to obtaining sufficient evidence to support an opinion about the effectiveness of controls is not susceptible to precise measurement, the auditor's judgment about whether he or she has obtained the principal evidence for the opinion will be qualitative as well as quantitative. For example, the auditor might give more weight to work he or she performed on pervasive controls and in areas such as the control environment than on other controls, such as controls over low-risk, routine transactions.

109. The auditor should evaluate whether to use the work performed by others in the audit of internal control over financial reporting. To determine the extent to which the auditor may use the work of others to alter the nature, timing, or extent of the work the auditor would have otherwise performed, in addition to obtaining the principal evidence for his or her opinion, the auditor should:

- a. Evaluate the nature of the controls subjected to the work of others (See paragraphs 112 through 116);

- b. Evaluate the competence and objectivity of the individuals who performed the work (See paragraphs 117 through 122); and

- c. Test some of the work performed by others to evaluate the quality and effectiveness of their work (See paragraphs 123 through 125).

**Note:** AU sec. 322, *The Auditor's Consideration of the Internal Audit Function in an Audit of Financial Statements*, applies to using the work of internal auditors in an audit of the financial statements. The auditor

may apply the relevant concepts described in that section to using the work of others in the audit of internal control over financial reporting.

110. The auditor must obtain sufficient evidence to support his or her opinion. Judgments about the sufficiency of evidence obtained and other factors affecting the auditor's opinion, such as the significance of identified control deficiencies, should be those of the auditor. Evidence obtained through the auditor's direct personal knowledge, observation, reperformance, and inspection is generally more persuasive than information obtained indirectly from others, such as from internal auditors, other company personnel, or third parties working under the direction of management.

111. The requirement that the auditor's own work must provide the principal evidence for the auditor's opinion is one of the boundaries within which the auditor determines the work he or she must perform himself or herself in the audit of internal control over financial reporting. Paragraphs 112 through 125 provide more specific and definitive direction on how the auditor makes this determination, but the directions allow the auditor significant flexibility to use his or her judgment to determine the work necessary to obtain the principal evidence and to determine when the auditor can use the work of others rather than perform the work himself or herself. Regardless of the auditor's determination of the work that he or she must perform himself or herself, the auditor's responsibility to report on the effectiveness of internal control over financial reporting rests solely with the auditor; this responsibility cannot be shared with the other individuals whose work the auditor uses. Therefore, when the auditor uses the work of others, the auditor is responsible for the results of their work.

112. *Evaluating the Nature of the Controls Subjected to the Work of Others.* The auditor should evaluate the following factors when evaluating the nature of the controls subjected to the work of others. As these factors increase in significance, the need for the auditor to perform his or her own work on those controls increases. As these factors decrease in significance, the need for the auditor to perform his or her own work on those controls decreases.

- The materiality of the accounts and disclosures that the control addresses and the risk of material misstatement.
- The degree of judgment required to evaluate the operating effectiveness of the control (that is, the degree to which

the evaluation of the effectiveness of the control requires evaluation of subjective factors rather than objective testing).

- The pervasiveness of the control.
- The level of judgment or estimation required in the account or disclosure.
- The potential for management override of the control.

113. Because of the nature of the controls in the control environment, the auditor should not use the work of others to reduce the amount of work he or she performs on controls in the control environment. The auditor should, however, consider the results of work performed in this area by others because it might indicate the need for the auditor to increase his or her work.

114. The control environment encompasses the following factors:<sup>16</sup>

- Integrity and ethical values;
- Commitment to competence;
- Board of directors or audit committee participation;
- Management's philosophy and operating style;
- Organizational structure;
- Assignment of authority and responsibility; and
- Human resource policies and procedures.

115. Controls that are part of the control environment include, but are not limited to, controls specifically established to prevent and detect fraud that is at least reasonably possible to result in material misstatement of the financial statements.

**Note:** The term "reasonably possible" has the same meaning as in FAS No. 5. See the first note to paragraph 9 for further discussion.

116. The auditor should perform the walkthroughs (as discussed beginning at paragraph 79) himself or herself because of the degree of judgment required in performing this work. However, to provide additional evidence, the auditor may also review the work of others who have performed and documented walkthroughs. In evaluating whether his or her own evidence provides the principal evidence, the auditor's work on the control environment and in performing walkthroughs constitutes an important part of the auditor's own work.

117. *Evaluating the Competence and Objectivity of Others.* The extent to which the auditor may use the work of others depends on the degree of competence and objectivity of the individuals performing the work. The higher the degree of competence and

objectivity, the greater use the auditor may make of the work; conversely, the lower the degree of competence and objectivity, the less use the auditor may make of the work. Further, the auditor should not use the work of individuals who have a low degree of objectivity, regardless of their level of competence. Likewise, the auditor should not use the work of individuals who have a low level of competence regardless of their degree of objectivity.

118. When evaluating the competence and objectivity of the individuals performing the tests of controls, the auditor should obtain, or update information from prior years, about the factors indicated in the following paragraph. The auditor should determine whether to test the existence and quality of those factors and, if so, the extent to which to test the existence and quality of those factors, based on the intended effect of the work of others on the audit of internal control over financial reporting.

119. Factors concerning the competence of the individuals performing the tests of controls include:

- Their educational level and professional experience.
- Their professional certification and continuing education.
- Practices regarding the assignment of individuals to work areas.
- Supervision and review of their activities.
- Quality of the documentation of their work, including any reports or recommendations issued.
- Evaluation of their performance.

120. Factors concerning the objectivity of the individuals performing the tests of controls include:

- The organizational status of the individuals responsible for the work of others ("testing authority") in testing controls, including—

a. Whether the testing authority reports to an officer of sufficient status to ensure sufficient testing coverage and adequate consideration of, and action on, the findings and recommendations of the individuals performing the testing.

b. Whether the testing authority has direct access and reports regularly to the board of directors or the audit committee.

c. Whether the board of directors or the audit committee oversees employment decisions related to the testing authority.

- Policies to maintain the individuals' objectivity about the areas being tested, including—

a. Policies prohibiting individuals from testing controls in areas in which

<sup>16</sup> See the COSO report and paragraph .110 of AU sec. 319, *Internal Control in a Financial Statement Audit*, for additional information about the factors included in the control environment.

relatives are employed in important or internal control-sensitive positions.

b. Policies prohibiting individuals from testing controls in areas to which they were recently assigned or are scheduled to be assigned upon completion of their controls testing responsibilities.

121. Internal auditors normally are expected to have greater competence with regard to internal control over financial reporting and objectivity than other company personnel. Therefore, the auditor may be able to use their work to a greater extent than the work of other company personnel. This is particularly true in the case of internal auditors who follow the *International Standards for the Professional Practice of Internal Auditing* issued by the Institute of Internal Auditors. If internal auditors have performed an extensive amount of relevant work and the auditor determines they possess a high degree of competence and objectivity, the auditor could use their work to the greatest extent an auditor could use the work of others. On the other hand, if the internal audit function reports solely to management, which would reduce internal auditors' objectivity, or if limited resources allocated to the internal audit function result in very limited testing procedures on its part or reduced competency of the internal auditors, the auditor should use their work to a much lesser extent and perform more of the testing himself or herself.

122. When determining how the work of others will alter the nature, timing, or extent of the auditor's work, the auditor should assess the interrelationship of the nature of the controls, as discussed in paragraph 112, and the competence and objectivity of those who performed the work, as discussed in paragraphs 117 through 121. As the significance of the factors listed in paragraph 112 increases, the ability of the auditor to use the work of others decreases at the same time that the necessary level of competence and objectivity of those who perform the work increases. For example, for some pervasive controls, the auditor may determine that using the work of internal auditors to a limited degree would be appropriate and that using the work of other company personnel would not be appropriate because other company personnel do not have a high enough degree of objectivity as it relates to the nature of the controls.

123. *Testing the Work of Others.* The auditor should test some of the work of others to evaluate the quality and effectiveness of the work. The auditor's tests of the work of others may be

accomplished by either (a) testing some of the controls that others tested or (b) testing similar controls not actually tested by others.

124. The nature and extent of these tests depend on the effect of the work of others on the auditor's procedures but should be sufficient to enable the auditor to make an evaluation of the overall quality and effectiveness of the work the auditor is considering. The auditor also should assess whether this evaluation has an effect on his or her conclusions about the competence and objectivity of the individuals performing the work.

125. In evaluating the quality and effectiveness of the work of others, the auditor should evaluate such factors as to whether the:

- Scope of work is appropriate to meet the objectives.
- Work programs are adequate.
- Work performed is adequately documented, including evidence of supervision and review.
- Conclusions are appropriate in the circumstances.
- Reports are consistent with the results of the work performed.

126. The following examples illustrate how to apply the directions discussed in this section:

- *Controls over the period-end financial reporting process.* Many of the controls over the period-end financial reporting process address significant risks of misstatement of the accounts and disclosures in the annual and quarterly financial statements, may require significant judgment to evaluate their operating effectiveness, may have a higher potential for management override, and may affect accounts that require a high level of judgment or estimation. Therefore, the auditor could determine that, based on the nature of controls over the period-end financial reporting process, he or she would need to perform more of the tests of those controls himself or herself. Further, because of the nature of the controls, the auditor should use the work of others only if the degree of competence and objectivity of the individuals performing the work is high; therefore, the auditor might use the work of internal auditors to some extent but not the work of others within the company.

- *Information technology general controls.* Information technology general controls are part of the control activities component of internal control; therefore, the nature of the controls might permit the auditor to use the work of others. For example, program change controls over routine maintenance changes may have a highly pervasive

effect, yet involve a low degree of judgment in evaluating their operating effectiveness, can be subjected to objective testing, and have a low potential for management override. Therefore, the auditor could determine that, based on the nature of these program change controls, the auditor could use the work of others to a moderate extent so long as the degree of competence and objectivity of the individuals performing the test is at an appropriate level. On the other hand, controls to detect attempts to override controls that prevent unauthorized journal entries from being posted may have a highly pervasive effect, may involve a high degree of judgment in evaluating their operating effectiveness, may involve a subjective evaluation, and may have a reasonable possibility for management override. Therefore, the auditor could determine that, based on the nature of these controls over systems access, he or she would need to perform more of the tests of those controls himself or herself. Further, because of the nature of the controls, the auditor should use the work of others only if the degree of competence and objectivity of the individuals performing the tests is high.

- *Management self-assessment of controls.* As described in paragraph 40, management may test the operating effectiveness of controls using a self-assessment process. Because such an assessment is made by the same personnel who are responsible for performing the control, the individuals performing the self-assessment do not have sufficient objectivity as it relates to the subject matter. Therefore, the auditor should not use their work.

- *Controls over the calculation of depreciation of fixed assets.* Controls over the calculation of depreciation of fixed assets are usually not pervasive, involve a low degree of judgment in evaluating their operating effectiveness, and can be subjected to objective testing. If these conditions describe the controls over the calculation of depreciation of fixed assets and if there is a low potential for management override, the auditor could determine that, based on the nature of these controls, the auditor could use the work of others to a large extent (perhaps entirely) so long as the degree of competence and objectivity of the individuals performing the test is at an appropriate level.

- *Alternating tests of controls.* Many of the controls over accounts payable, including controls over cash disbursements, are usually not pervasive, involve a low degree of judgment in evaluating their operating

effectiveness, can be subjected to objective testing, and have a low potential for management override. When these conditions describe the controls over accounts payable, the auditor could determine that, based on the nature of these controls, he or she could use the work of others to a large extent (perhaps entirely) so long as the degree of competence and objectivity of the individuals performing the test is at an appropriate level. However, if the company recently implemented a major information technology change that significantly affected controls over cash disbursements, the auditor might decide to use the work of others to a lesser extent in the audit immediately following the information technology change and then return, in subsequent years, to using the work of others to a large extent in this area. As another example, the auditor might use the work of others for testing controls over the depreciation of fixed assets (as described in the point above) for several years' audits but decide one year to perform some extent of the work himself or herself to gain an understanding of these controls beyond that provided by performing a walkthrough.

#### *Forming an Opinion on the Effectiveness of Internal Control Over Financial Reporting*

127. When forming an opinion on internal control over financial reporting, the auditor should evaluate all evidence obtained from all sources, including:

- The adequacy of the assessment performed by management and the results of the auditor's evaluation of the design and tests of operating effectiveness of controls;
- The negative results of substantive procedures performed during the financial statement audit (for example, recorded and unrecorded adjustments identified as a result of the performance of the auditing procedures); and
- Any identified control deficiencies.

128. As part of this evaluation, the auditor should review all reports issued during the year by internal audit (or similar functions, such as loan review in a financial institution) that address controls related to internal control over financial reporting and evaluate any control deficiencies identified in those reports. This review should include reports issued by internal audit as a result of operational audits or specific reviews of key processes if those reports address controls related to internal control over financial reporting.

129. *Issuing an Unqualified Opinion.* The auditor may issue an unqualified opinion only when there are no identified material weaknesses and

when there have been no restrictions on the scope of the auditor's work. The existence of a material weakness requires the auditor to express an adverse opinion on the effectiveness of internal control over financial reporting (See paragraph 175), while a scope limitation requires the auditor to express a qualified opinion or a disclaimer of opinion, depending on the significance of the limitation in scope (See paragraph 178).

130. *Evaluating Deficiencies in Internal Control Over Financial Reporting.* The auditor must evaluate identified control deficiencies and determine whether the deficiencies, individually or in combination, are significant deficiencies or material weaknesses. The evaluation of the significance of a deficiency should include both quantitative and qualitative factors.

131. The auditor should evaluate the significance of a deficiency in internal control over financial reporting initially by determining the following:

- The likelihood that a deficiency, or a combination of deficiencies, could result in a misstatement of an account balance or disclosure; and
- The magnitude of the potential misstatement resulting from the deficiency or deficiencies.

132. The significance of a deficiency in internal control over financial reporting depends on the *potential* for a misstatement, not on whether a misstatement actually has occurred.

133. Several factors affect the *likelihood* that a deficiency, or a combination of deficiencies, could result in a misstatement of an account balance or disclosure. The factors include, but are not limited to, the following:

- The nature of the financial statement accounts, disclosures, and assertions involved; for example, suspense accounts and related party transactions involve greater risk.
- The susceptibility of the related assets or liability to loss or fraud; that is, greater susceptibility increases risk.
- The subjectivity, complexity, or extent of judgment required to determine the amount involved; that is, greater subjectivity, complexity, or judgment, like that related to an accounting estimate, increases risk.
- The cause and frequency of known or detected exceptions for the operating effectiveness of a control; for example, a control with an observed non-negligible deviation rate is a deficiency.
- The interaction or relationship of the control with other controls; that is, the interdependence or redundancy of the control.

- The interaction of the deficiencies; for example, when evaluating a combination of two or more deficiencies, whether the deficiencies could affect the same financial statement accounts and assertions.

- The possible future consequences of the deficiency.

134. When evaluating the likelihood that a deficiency or combination of deficiencies could result in a misstatement, the auditor should evaluate how the controls interact with other controls. There are controls, such as information technology general controls, on which other controls depend. Some controls function together as a group of controls. Other controls overlap, in the sense that these other controls achieve the same objective.

135. Several factors affect the magnitude of the misstatement that could result from a deficiency or deficiencies in controls. The factors include, but are not limited to, the following:

- The financial statement amounts or total of transactions exposed to the deficiency.
- The volume of activity in the account balance or class of transactions exposed to the deficiency that has occurred in the current period or that is expected in future periods.

136. In evaluating the magnitude of the potential misstatement, the auditor should recognize that the maximum amount that an account balance or total of transactions can be overstated is generally the recorded amount.

However, the recorded amount is not a limitation on the amount of potential understatement. The auditor also should recognize that the risk of misstatement might be different for the maximum possible misstatement than for lesser possible amounts.

137. When evaluating the significance of a deficiency in internal control over financial reporting, the auditor also should determine the level of detail and degree of assurance that would satisfy prudent officials in the conduct of their own affairs that they have reasonable assurance that transactions are recorded as necessary to permit the preparation of financial statements in conformity with generally accepted accounting principles. If the auditor determines that the deficiency would prevent prudent officials in the conduct of their own affairs from concluding that they have reasonable assurance,<sup>17</sup> then the auditor

<sup>17</sup> See SEC Staff Accounting Bulletin Topic 1M2, *Immaterial Misstatements That Are Intentional*, for further discussion about the level of detail and degree of assurance that would satisfy prudent officials in the conduct of their own affairs.

should deem the deficiency to be at least a significant deficiency. Having determined in this manner that a deficiency represents a significant deficiency, the auditor must further evaluate the deficiency to determine whether individually, or in combination with other deficiencies, the deficiency is a material weakness.

**Note:** Paragraphs 9 and 10 provide the definitions of significant deficiency and material weakness, respectively.

138. Inadequate documentation of the design of controls and the absence of sufficient documented evidence to support management's assessment of the operating effectiveness of internal control over financial reporting are control deficiencies. As with other control deficiencies, the auditor should evaluate these deficiencies as to their significance.

139. The interaction of qualitative considerations that affect internal control over financial reporting with quantitative considerations ordinarily results in deficiencies in the following areas being at least significant deficiencies in internal control over financial reporting:

- Controls over the selection and application of accounting policies that are in conformity with generally accepted accounting principles;
- Antifraud programs and controls;
- Controls over non-routine and non-systematic transactions; and
- Controls over the period-end financial reporting process, including controls over procedures used to enter transaction totals into the general ledger; initiate, authorize, record, and process journal entries into the general ledger; and record recurring and nonrecurring adjustments to the financial statements.

140. Each of the following circumstances should be regarded as at least a significant deficiency and as a strong indicator that a material weakness in internal control over financial reporting exists:

- Restatement of previously issued financial statements to reflect the correction of a misstatement.

**Note:** The correction of a misstatement includes misstatements due to error or fraud; it does not include restatements to reflect a change in accounting principle to comply with a new accounting principle or a voluntary change from one generally accepted accounting principle to another generally accepted accounting principle.

- Identification by the auditor of a material misstatement in financial statements in the current period that was not initially identified by the company's internal control over

financial reporting. (This is a strong indicator of a material weakness even if management subsequently corrects the misstatement.)

- Oversight of the company's external financial reporting and internal control over financial reporting by the company's audit committee is ineffective. (Paragraphs 55 through 59 present factors to evaluate when determining whether the audit committee is ineffective.)
- The internal audit function or the risk assessment function is ineffective at a company for which such a function needs to be effective for the company to have an effective monitoring or risk assessment component, such as for very large or highly complex companies.

**Note:** The evaluation of the internal audit or risk assessment functions is similar to the evaluation of the audit committee, as described in paragraphs 55 through 59, that is, the evaluation is made within the context of the monitoring and risk assessment components. The auditor is not required to make a separate evaluation of the effectiveness and performance of these functions. Instead, the auditor should base his or her evaluation on evidence obtained as part of evaluating the monitoring and risk assessment components of internal control over financial reporting.

- For complex entities in highly regulated industries, an ineffective regulatory compliance function. This relates solely to those aspects of the ineffective regulatory compliance function in which associated violations of laws and regulations could have a material effect on the reliability of financial reporting.
- Identification of fraud of any magnitude on the part of senior management.

**Note:** The auditor is required to plan and perform procedures to obtain reasonable assurance that material misstatement caused by fraud is detected by the auditor. However, for the purposes of evaluating and reporting deficiencies in internal control over financial reporting, the auditor should evaluate fraud of any magnitude (including fraud resulting in immaterial misstatements) on the part of senior management of which he or she is aware. Furthermore, for the purposes of this circumstance, "senior management" includes the principal executive and financial officers signing the company's certifications as required under Section 302 of the Act as well as any other member of management who play a significant role in the company's financial reporting process.

- Significant deficiencies that have been communicated to management and the audit committee remain uncorrected after some reasonable period of time.
- An ineffective control environment.

141. Appendix D provides examples of significant deficiencies and material weaknesses.

## Requirement for Written Representations

142. In an audit of internal control over financial reporting, the auditor should obtain written representations from management:

- a. Acknowledging management's responsibility for establishing and maintaining effective internal control over financial reporting;
- b. Stating that management has performed an assessment of the effectiveness of the company's internal control over financial reporting and specifying the control criteria;
- c. Stating that management did not use the auditor's procedures performed during the audits of internal control over financial reporting or the financial statements as part of the basis for management's assessment of the effectiveness of internal control over financial reporting;
- d. Stating management's conclusion about the effectiveness of the company's internal control over financial reporting based on the control criteria as of a specified date;
- e. Stating that management has disclosed to the auditor all deficiencies in the design or operation of internal control over financial reporting identified as part of management's assessment, including separately disclosing to the auditor all such deficiencies that it believes to be significant deficiencies or material weaknesses in internal control over financial reporting;
- f. Describing any material fraud and any other fraud that, although not material, involves senior management or management or other employees who have a significant role in the company's internal control over financial reporting;
- g. Stating whether control deficiencies identified and communicated to the audit committee during previous engagements pursuant to paragraph 207 have been resolved, and specifically identifying any that have not; and
- h. Stating whether there were, subsequent to the date being reported on, any changes in internal control over financial reporting or other factors that might significantly affect internal control over financial reporting, including any corrective actions taken by management with regard to significant deficiencies and material weaknesses.

143. The failure to obtain written representations from management, including management's refusal to furnish them, constitutes a limitation on the scope of the audit sufficient to preclude an unqualified opinion. As discussed further in paragraph 178,

when management limits the scope of the audit, the auditor should either withdraw from the engagement or disclaim an opinion. Further, the auditor should evaluate the effects of management's refusal on his or her ability to rely on other representations, including, if applicable, representations obtained in an audit of the company's financial statements.

144. AU sec. 333, *Management Representations*, explains matters such as who should sign the letter, the period to be covered by the letter, and when to obtain an updating letter.

#### **Relationship of an Audit of Internal Control over Financial Reporting to an Audit of Financial Statements**

145. The audit of internal control over financial reporting should be integrated with the audit of the financial statements. The objectives of the procedures for the audits are not identical, however, and the auditor must plan and perform the work to achieve the objectives of both audits.

146. The understanding of internal control over financial reporting the auditor obtains and the procedures the auditor performs for purposes of expressing an opinion on management's assessment are interrelated with the internal control over financial reporting understanding the auditor obtains any procedures the auditor performs to assess control risk for purposes of expressing an opinion on the financial statements. As a result, it is efficient for the auditor to coordinate obtaining the understanding and performing the procedures.

#### ***Tests of Controls in an Audit of Internal Control Over Financial Reporting***

147. The objective of the tests of controls in an audit of internal control over financial reporting is to obtain evidence about the effectiveness of controls to support the auditor's opinion on whether management's assessment of the effectiveness of the company's internal control over financial reporting is fairly stated. The auditor's opinion relates to the effectiveness of the company's internal control over financial reporting as of a *point in time* and *taken as a whole*.

148. To express an opinion on internal control over financial reporting effectiveness as of a *point in time*, the auditor should obtain evidence that internal control over financial reporting has operated effectively for a sufficient period of time, which may be less than the entire period (ordinarily one year) covered by the company's financial statements. To express an opinion on internal control over financial reporting

effectiveness *taken as a whole*, the auditor must obtain evidence about the effectiveness of controls over all relevant assertions related to all significant accounts and disclosures in the financial statements. This requires that the auditor test the design and operating effectiveness of controls he or she ordinarily would not test if expressing an opinion only on the financial statements.

149. When concluding on the effectiveness of internal control over financial reporting for purposes of expressing an opinion on management's assessment, the auditor should incorporate the results of any additional tests of controls performed to achieve the objective related to expressing an opinion on the financial statements, as discussed in the following section.

#### ***Tests of Controls in an Audit of Financial Statements***

150. To express an opinion on the financial statements, the auditor ordinarily performs tests of controls and substantive procedures. The objective of the tests of controls the auditor performs for this purpose is to assess control risk. To assess control risk for specific financial statement assertions at less than the maximum, the auditor is required to obtain evidence that the relevant controls operated effectively during the *entire period* upon which the auditor plans to place reliance on those controls. However, the auditor is not required to assess control risk at less than the maximum for *all* relevant assertions and, for a variety of reasons, the auditor may choose not to do so.<sup>18</sup>

151. When concluding on the effectiveness of controls for the purpose of assessing control risk, the auditor also should evaluate the results of any additional tests of controls performed to achieve the objective related to expressing an opinion on management's assessment, as discussed in paragraphs 147 through 149. Consideration of these results may require the auditor to alter the nature, timing, and extent of substantive procedures and to plan and perform further tests of controls, particularly in response to identified control deficiencies.

#### ***Effect of Tests of Controls on Substantive Procedures***

152. Regardless of the assessed level of control risk or the assessed risk of material misstatement in connection with the audit of the financial statements, the auditor should perform

substantive procedures for all relevant assertions related to all significant accounts and disclosures. Performing procedures to express an opinion on internal control over financial reporting does not diminish this requirement.

153. The substantive procedures that the auditor should perform consist of tests of details of transactions and balances and analytical procedures. Before using the results obtained from substantive analytical procedures, the auditor should either test the design and operating effectiveness of controls over financial information used in the substantive analytical procedures or perform other procedures to support the completeness and accuracy of the underlying information. For significant risks of material misstatement, it is unlikely that audit evidence obtained from substantive analytical procedures alone will be sufficient.

154. When designing substantive analytical procedures, the auditor also should evaluate the risk of management override of controls. As part of this process, the auditor should evaluate whether such an override might have allowed adjustments outside of the normal period-end financial reporting process to have been made to the financial statements. Such adjustments might have resulted in artificial changes to the financial statement relationships being analyzed, causing the auditor to draw erroneous conclusions. For this reason, substantive analytical procedures alone are not well suited to detecting fraud.

155. The auditor's substantive procedures must include reconciling the financial statements to the accounting records. The auditor's substantive procedures also should include examining material adjustments made during the course of preparing the financial statements. Also, other auditing standards require auditors to perform specific tests of details in the financial statement audit. For instance, AU sec. 316, *Consideration of Fraud in a Financial Statement Audit*, requires the auditor to perform certain tests of details to further address the risk of management override, whether or not a specific risk of fraud has been identified. Paragraph .34 of AU Sec. 330, *The Confirmation Process*, states that there is a presumption that the auditor will request the confirmation of accounts receivable. Similarly, paragraph .01 of AU Sec. 331, *Inventories*, states that observation of inventories is a generally accepted auditing procedure and that the auditor who issues an opinion without this procedure "has the burden of justifying the opinion expressed."

<sup>18</sup> See paragraph 160 for additional documentation requirements when the auditor assesses control risk as other than low.

156. If, during the audit of internal control over financial reporting, the auditor identifies a control deficiency, he or she should determine the effect on the nature, timing, and extent of substantive procedures to be performed to reduce the risk of material misstatement of the financial statements to an appropriately low level.

*Effect of Substantive Procedures on the Auditor's Conclusions About the Operating Effectiveness of Controls*

157. In an audit of internal control over financial reporting, the auditor should evaluate the effect of the findings of all substantive auditing procedures performed in the audit of financial statements on the effectiveness of internal control over financial reporting. This evaluation should include, but not be limited to:

- The auditor's risk evaluations in connection with the selection and application of substantive procedures, especially those related to fraud (See paragraph 26);
- Findings with respect to illegal acts and related party transactions;
- Indications of management bias in making accounting estimates and in selecting accounting principles; and
- Misstatements detected by substantive procedures. The extent of such misstatements might alter the auditor's judgment about the effectiveness of controls.

158. However, the absence of misstatements detected by substantive procedures does not provide evidence that controls related to the assertion being tested are effective.

**Documentation Requirements**

159. In addition to the documentation requirements in AU sec. 339, *Audit Documentation*, the auditor should document:

- The understanding obtained and the evaluation of the design of each of the five components of the company's internal control over financial reporting;
- The process used to determine significant accounts and disclosures and major classes of transactions, including the determination of the locations of business units at which to perform testing;
- The identification of the points at which misstatements related to relevant financial statement assertions could occur within significant accounts and disclosures and major classes of transactions;
- The extent to which the auditor relied upon work performed by others as well as the auditor's assessment of their competence and objectivity;

• The evaluation of any deficiencies noted as a result of the auditor's testing; and

- Other findings that could result in a modification to the auditor's report.

160. For a company that has effective internal control over financial reporting, the auditor ordinarily will be able to perform sufficient testing of controls to be able to assess control risk for all relevant assertions related to significant accounts and disclosures at a low level. If, however, the auditor assesses control risk as other than low for certain assertions or significant accounts, the auditor should document the reasons for that conclusion. Examples of when it is appropriate to assess control risk as other than low include:

- When a control over a relevant assertion related to a significant account or disclosure was superseded late in the year and only the new control was tested for operating effectiveness.
- When a material weakness existed during the period under audit and was corrected by the end of the period.

161. The auditor also should document the effect of a conclusion that control risk is other than low for any relevant assertions related to any significant accounts in connection with the audit of the financial statements on his or her opinion on the audit of internal control over financial reporting.

**Reporting on Internal Control Over Financial Reporting**

*Management's Report*

162. Management is required to include in its annual report its assessment of the effectiveness of the company's internal control over financial reporting in addition to its audited financial statements as of the end of the most recent fiscal year. Management's report on internal control over financial reporting is required to include the following:<sup>19</sup>

- A statement of management's responsibility for establishing and maintaining adequate internal control over financial reporting for the company;
- A statement identifying the framework used by management to conduct the required assessment of the effectiveness of the company's internal control over financial reporting;
- An assessment of the effectiveness of the company's internal control over financial reporting as of the end of the company's most recent fiscal year, including an explicit statement as to

whether that internal control over financial reporting is effective; and

- A statement that the registered public accounting firm that audited the financial statements included in the annual report has issued an attestation report on management's assessment of the company's internal control over financial reporting.

163. Management should provide, both in its report on internal control over financial reporting and in its representation letter to the auditor, a written conclusion about the effectiveness of the company's internal control over financial reporting. The conclusion about the effectiveness of a company's internal control over financial reporting can take many forms; however, management is required to state a direct conclusion about whether the company's internal control over financial reporting is effective. This standard, for example, includes the phrase "management's assessment that W Company maintained effective internal control over financial reporting as of [date]" to illustrate such a conclusion. Other phrases, such as "management's assessment that W Company's internal control over financial reporting as of [date] is sufficient to meet the stated objectives," also might be used. However, the conclusion should not be so subjective (for example, "very effective internal control") that people having competence in and using the same or similar criteria would not ordinarily be able to arrive at similar conclusions.

164. Management is precluded from concluding that the company's internal control over financial reporting is effective if there are one or more material weaknesses.<sup>20</sup> In addition, management is required to disclose all material weaknesses that exist as of the end of the most recent fiscal year.

165. Management might be able to accurately represent that internal control over financial reporting, as of the end of the company's most recent fiscal year, is effective even if one or more material weaknesses existed during the period. To make this representation, management must have changed the internal control over financial reporting to eliminate the material weaknesses sufficiently in advance of the "as of" date and have satisfactorily tested the effectiveness over a period of time that is adequate for it to determine whether, as of the end of the fiscal year, the design and

<sup>19</sup> See Item 308(a) of Regulation S-B and S-K, 17 CFR 228.308(a) and 17 CFR 229.308(a), respectively.

<sup>20</sup> See Item 308(a)(3) of Regulation S-B and S-K, 17 CFR 228.308(a) and 17 CFR 229.308(a), respectively.

operation of internal control over financial reporting is effective.<sup>21</sup>

#### *Auditor's Evaluation of Management's Report*

166. With respect to management's report on its assessment, the auditor should evaluate the following matters:

- a. Whether management has properly stated its responsibility for establishing and maintaining adequate internal control over financial reporting.
- b. Whether the framework used by management to conduct the evaluation is suitable. (As discussed in paragraph 14, the framework described in COSO constitutes a suitable and available framework.)
- c. Whether management's assessment of the effectiveness of internal control over financial reporting, as of the end of the company's most recent fiscal year, is free of material misstatement.
- d. Whether management has expressed its assessment in an acceptable form.

- Management is required to state whether the company's internal control over financial reporting is effective.
- A negative assurance statement indicating that, "Nothing has come to management's attention to suggest that the company's internal control over financial reporting is not effective," is not acceptable.
- Management is not permitted to conclude that the company's internal control over financial reporting is effective if there are one or more material weaknesses in the company's internal control over financial reporting.

e. Whether material weaknesses identified in the company's internal control over financial reporting, if any, have been properly disclosed, including material weaknesses corrected during the period.<sup>22</sup>

<sup>21</sup> However, when the reason for a change in internal control over financial reporting is the correction of a material weakness, management and the auditor should evaluate whether the reason for the change and the circumstances surrounding the change are material information necessary to make the disclosure about the change not misleading in a filing subject to certification under Securities Exchange Act Rule 13a-14(a) or 15d-14(a), 17 CFR 240.13a-14(a) or 17 CFR 240.15d-14(a). See discussion beginning at paragraph 200 for further direction.

<sup>22</sup> See paragraph 206 for direction when a material weakness was corrected during the fourth quarter and the auditor believes that modification to the disclosures about changes in internal control over financial reporting are necessary for the annual certifications to be accurate and to comply with the requirements of Section 302 of the Act.

#### *Auditor's Report on Management's Assessment of Internal Control Over Financial Reporting*

167. The auditor's report on management's assessment of the effectiveness of internal control over financial reporting must include the following elements:

- a. A title that includes the word *independent*;
- b. An identification of management's conclusion about the effectiveness of the company's internal control over financial reporting as of a specified date based on the control criteria [for example, criteria established in *Internal Control-Integrated Framework* issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO)];
- c. An identification of the title of the management report that includes management's assessment (the auditor should use the same description of the company's internal control over financial reporting as management uses in its report);
- d. A statement that the assessment is the responsibility of management;
- e. A statement that the auditor's responsibility is to express an opinion on the assessment and an opinion on the company's internal control over financial reporting based on his or her audit;
- f. A definition of internal control over financial reporting as stated in paragraph 7;
- g. A statement that the audit was conducted in accordance with the standards of the Public Company Accounting Oversight Board (United States);
- h. A statement that the standards of the Public Company Accounting Oversight Board require that the auditor plan and perform the audit to obtain reasonable assurance about whether effective internal control over financial reporting was maintained in all material respects;
- i. A statement that an audit includes obtaining an understanding of internal control over financial reporting, evaluating management's assessment, testing and evaluating the design and operating effectiveness of internal control, and performing such other procedures as the auditor considered necessary in the circumstances;
- j. A statement that the auditor believes the audit provides a reasonable basis for his or her opinions;
- k. A paragraph stating that, because of inherent limitations, internal control over financial reporting may not prevent or detect misstatements and that projections of any evaluation of

effectiveness to future periods are subject to the risk that controls may become inadequate because of changes in conditions, or that the degree of compliance with the policies or procedures may deteriorate;

l. The auditor's opinion on whether management's assessment of the effectiveness of the company's internal control over financial reporting as of the specified date is fairly stated, in all material respects, based on the control criteria (See discussion beginning at paragraph 162);

m. The auditor's opinion on whether the company maintained, in all material respects, effective internal control over financial reporting as of the specified date, based on the control criteria;

n. The manual or printed signature of the auditor's firm;

o. The city and state (or city and country, in the case of non-U.S. auditors) from which the auditor's report has been issued; and

p. The date of the audit report.

168. Example A-1 in Appendix A is an illustrative auditor's report for an unqualified opinion on management's assessment of the effectiveness of the company's internal control over financial reporting and an unqualified opinion on the effectiveness of the company's internal control over financial reporting.

169. *Separate or Combined Reports.* The auditor may choose to issue a combined report (that is, one report containing both an opinion on the financial statements and the opinions on internal control over financial reporting) or separate reports on the company's financial statements and on internal control over financial reporting. Example A-7 in Appendix A is an illustrative combined audit report on internal control over financial reporting. Appendix A also includes examples of separate reports on internal control over financial reporting.

170. If the auditor chooses to issue a separate report on internal control over financial reporting, he or she should add the following paragraph to the auditor's report on the financial statements:

We also have audited, in accordance with the standards of the Public Company Accounting Oversight Board (United States), the effectiveness of W Company's internal control over financial reporting as of December 31, 20X3, based on [*identify control criteria*] and our report dated [*date of report, which should be the same as the date of the report on the financial statements*] expressed [*include nature of opinions*].

and add the following paragraph to the report on internal control over financial reporting:

We have also audited, in accordance with the standards of the Public Company Accounting Oversight Board (United States), the [identify financial statements] of W Company and our report dated [date of report, which should be the same as the date of the report on the effectiveness of internal control over financial reporting] expressed [include nature of opinion].

171. *Report Date.* As stated previously, the auditor cannot audit internal control over financial reporting without also auditing the financial statements. Therefore, the reports should be dated the same.

172. When the auditor elects to issue a combined report on the audit of the financial statements and the audit of internal control over financial reporting, the audit opinion will address multiple reporting periods for the financial statements presented but only the end of the most recent fiscal year for the effectiveness of internal control over financial reporting and management's assessment of the effectiveness of internal control over financial reporting. See a combined report in Example A-7 in Appendix A.

173. *Report Modifications.* The auditor should modify the standard report if any of the following conditions exist.

- a. Management's assessment is inadequate or management's report is inappropriate. (See paragraph 174.)
- b. There is a material weakness in the company's internal control over financial reporting. (See paragraphs 175 through 177.)
- c. There is a restriction on the scope of the engagement. (See paragraphs 178 through 181.)
- d. The auditor decides to refer to the report of other auditors as the basis, in part, for the auditor's own report. (See paragraphs 182 through 185.)
- e. A significant subsequent event has occurred since the date being reported on. (See paragraphs 186 through 189.)
- f. There is other information contained in management's report on internal control over financial reporting. (See paragraphs 190 through 192.)

174. *Management's Assessment Inadequate or Report Inappropriate.* If the auditor determines that management's process for assessing internal control over financial reporting is inadequate, the auditor should modify his or her opinion for a scope limitation (discussed further beginning at paragraph 178). If the auditor determines that management's report is inappropriate, the auditor should

modify his or her report to include, at a minimum, an explanatory paragraph describing the reasons for this conclusion.

175. *Material Weaknesses.* Paragraphs 130 through 141 describe significant deficiencies and material weaknesses. If there are significant deficiencies that, individually or in combination, result in one or more material weaknesses, management is precluded from concluding that internal control over financial reporting is effective. In these circumstances, the auditor must express an adverse opinion on the company's internal control over financial reporting.

176. When expressing an adverse opinion on the effectiveness of internal control over financial reporting because of a material weakness, the auditor's report must include:

- The definition of a material weakness, as provided in paragraph 10.
- A statement that a material weakness has been identified and included in management's assessment. (If the material weakness has not been included in management's assessment, this sentence should be modified to state that the material weakness has been identified but not included in management's assessment. In this case, the auditor also is required to communicate in writing to the audit committee that the material weakness was not disclosed or identified as a material weakness in management's report.)
- A description of any material weaknesses identified in a company's internal control over financial reporting. This description should provide the users of the audit report with specific information about the nature of any material weakness, and its actual and potential effect on the presentation of the company's financial statements issued during the existence of the weakness. This description also should address requirements described in paragraph 194.

177. Depending on the circumstances, the auditor may express both an unqualified opinion and an other-than-unqualified opinion within the same report on internal control over financial reporting. For example, if management makes an adverse assessment because a material weakness has been identified and not corrected ("\* \* \* internal control over financial reporting is not effective \* \* \*"), the auditor would express an unqualified opinion on management's assessment ("\* \* \* management's assessment that internal control over financial reporting is not effective is fairly stated, in all material respects \* \* \*"). At the same time, the auditor would express an adverse

opinion about the effectiveness of internal control over financial reporting ("In our opinion, because of the effect of the material weakness described \* \* \*, the company's internal control over financial reporting is not effective.")). Example A-2 in Appendix A illustrates the form of the report that is appropriate in this situation. Example A-6 in Appendix A illustrates a report that reflects disagreement between management and the auditor that a material weakness exists.

178. *Scope Limitations.* The auditor can express an unqualified opinion on management's assessment of internal control over financial reporting and an unqualified opinion on the effectiveness of internal control over financial reporting only if the auditor has been able to apply all the procedures necessary in the circumstances. If there are restrictions on the scope of the engagement imposed by the circumstances, the auditor should withdraw from the engagement, disclaim an opinion, or express a qualified opinion. The auditor's decision depends on his or her assessment of the importance of the omitted procedure(s) to his or her ability to form an opinion on management's assessment of internal control over financial reporting and an opinion on the effectiveness of the company's internal control over financial reporting. However, when the restrictions are imposed by management, the auditor should withdraw from the engagement or disclaim an opinion on management's assessment of internal control over financial reporting and the effectiveness of internal control over financial reporting.

179. For example, management might have identified a material weakness in its internal control over financial reporting prior to the date specified in its report and implemented controls to correct it. If management believes that the new controls have been operating for a sufficient period of time to determine that they are both effectively designed and operating, management would be able to include in its assessment its conclusion that internal control over financial reporting is effective as of the date specified. However, if the auditor disagrees with the sufficiency of the time period, he or she would be unable to obtain sufficient evidence that the new controls have been operating effectively for a sufficient period. In that case, the auditor should modify the opinion on the effectiveness of internal control over financial reporting and the opinion on management's assessment of internal

control over financial reporting because of a scope limitation.

180. When the auditor plans to disclaim an opinion and the limited procedures performed by the auditor caused the auditor to conclude that a material weakness exists, the auditor's report should include:

- The definition of a material weakness, as provided in paragraph 10.
- A description of any material weaknesses identified in the company's internal control over financial reporting. This description should provide the users of the audit report with specific information about the nature of any material weakness, and its actual and potential effect on the presentation of the company's financial statements issued during the existence of the weakness. This description also should address the requirements in paragraph 194.

181. Example A-3 in Appendix A illustrates the form of report when there is a limitation on the scope of the audit causing the auditor to issue qualified opinions. Example A-4 illustrates the form of report when restrictions on the scope of the audit cause the auditor to disclaim opinions.

182. *Opinions Based, in Part, on the Report of Another Auditor.* When another auditor has audited the financial statements and internal control over financial reporting of one or more subsidiaries, divisions, branches, or components of the company, the auditor should determine whether he or she may serve as the principal auditor and use the work and reports of another auditor as a basis, in part, for his or her opinions. AU sec. 543, *Part of Audit Performed by Other Independent Auditors*, provides direction on the auditor's decision of whether to serve as the principal auditor of the financial statements. If the auditor decides it is appropriate to serve as the principal auditor of the financial statements, then that auditor also should be the principal auditor of the company's internal control over financial reporting. This relationship results from the requirement that an audit of the financial statements must be performed to audit internal control over financial reporting; only the principal auditor of the financial statements can be the principal auditor of internal control over financial reporting. In this circumstance, the principal auditor of the financial statements needs to participate sufficiently in the audit of internal control over financial reporting to provide a basis for serving as the principal auditor of internal control over financial reporting.

183. When serving as the principal auditor of internal control over financial reporting, the auditor should decide whether to make reference in the report on internal control over financial reporting to the audit of internal control over financial reporting performed by the other auditor. In these circumstances, the auditor's decision is based on factors similar to those of the independent auditor who uses the work and reports of other independent auditors when reporting on a company's financial statements as described in AU sec. 543.

184. The decision about whether to make reference to another auditor in the report on the audit of internal control over financial reporting might differ from the corresponding decision as it relates to the audit of the financial statements. For example, the audit report on the financial statements may make reference to the audit of a significant equity investment performed by another independent auditor, but the report on internal control over financial reporting might not make a similar reference because management's evaluation of internal control over financial reporting ordinarily would not extend to controls at the equity method investee.<sup>23</sup>

185. When the auditor decides to make reference to the report of the other auditor as a basis, in part, for his or her opinions, the auditor should refer to the report of the other auditor when describing the scope of the audit and when expressing the opinions.

186. *Subsequent Events.* Changes in internal control over financial reporting or other factors that might significantly affect internal control over financial reporting might occur subsequent to the date as of which internal control over financial reporting is being audited but before the date of the auditor's report. The auditor should inquire of management whether there were any such changes or factors. As described in paragraph 142, the auditor should obtain written representations from management relating to such matters. Additionally, to obtain information about whether changes have occurred that might affect the effectiveness of the company's internal control over financial reporting and, therefore, the auditor's report, the auditor should inquire about and examine, for this subsequent period, the following:

- Relevant internal audit reports (or similar functions, such as loan review in

a financial institution) issued during the subsequent period;

- Independent auditor reports (if other than the auditor's) of significant deficiencies or material weaknesses;
- Regulatory agency reports on the company's internal control over financial reporting; and
- Information about the effectiveness of the company's internal control over financial reporting obtained through other engagements.

187. The auditor could inquire about and examine other documents for the subsequent period. Paragraphs .01 through .09 of AU sec. 560, *Subsequent Events*, provides direction on subsequent events for a financial statement audit that also may be helpful to the auditor performing an audit of internal control over financial reporting.

188. If the auditor obtains knowledge about subsequent events that materially and adversely affect the effectiveness of the company's internal control over financial reporting as of the date specified in the assessment, the auditor should issue an adverse opinion on the effectiveness of internal control over financial reporting (and issue an adverse opinion on management's assessment of internal control over financial reporting if management's report does not appropriately assess the affect of the subsequent event). If the auditor is unable to determine the effect of the subsequent event on the effectiveness of the company's internal control over financial reporting, the auditor should disclaim opinions. As described in paragraph 190, the auditor should disclaim an opinion on management's disclosures about corrective actions taken by the company after the date of management's assessment, if any.

189. The auditor may obtain knowledge about subsequent events with respect to conditions that did not exist at the date specified in the assessment but arose subsequent to that date. If a subsequent event of this type has a material effect on the company, the auditor should include in his or her report an explanatory paragraph describing the event and its effects or directing the reader's attention to the event and its effects as disclosed in management's report. Management's consideration of such events to be disclosed in its report should be limited to a change that has materially affected, or is reasonably likely to materially affect, the company's internal control over financial reporting.

190. *Management's Report Containing Additional Information.* Management's report on internal control over financial reporting may contain information in addition to management's assessment of

<sup>23</sup> See Appendix B, paragraph B15, for further discussion of the evaluation of the controls over financial reporting for an equity method investment.

the effectiveness of its internal control over financial reporting. Such information might include, for example:

- Disclosures about corrective actions taken by the company after the date of management's assessment;
- The company's plans to implement new controls; and
- A statement that management believes the cost of correcting a material weakness would exceed the benefits to be derived from implementing new controls.

191. If management's assessment includes such additional information, the auditor should disclaim an opinion on the information. For example, the auditor should use the following language as the last paragraph of the report to disclaim an opinion on management's cost-benefit statement:

We do not express an opinion or any other form of assurance on management's statement referring to the costs and related benefits of implementing new controls.

192. If the auditor believes that management's additional information contains a material misstatement of fact, he or she should discuss the matter with management. If the auditor concludes that there is a valid basis for concern, he or she should propose that management consult with some other party whose advice might be useful, such as the company's legal counsel. If, after discussing the matter with management and those management has consulted, the auditor concludes that a material misstatement of fact remains, the auditor should notify management and the audit committee, in writing, of the auditor's views concerning the information. The auditor also should consider consulting the auditor's legal counsel about further actions to be taken, including the auditor's responsibility under Section 10A of the Securities Exchange Act of 1934.<sup>24</sup>

**Note:** If management makes the types of disclosures described in paragraph 190 outside its report on internal control over financial reporting and includes them elsewhere within its annual report on the company's financial statements, the auditor would not need to disclaim an opinion, as described in paragraph 191. However, in that situation, the auditor's responsibilities are the same as those described in paragraph 192 if the auditor believes that the additional information contains a material misstatement of fact.

193. *Effect of Auditor's Adverse Opinion on Internal Control Over Financial Reporting on the Opinion on Financial Statements.* In some cases, the

auditor's report on internal control over financial reporting might describe a material weakness that resulted in an adverse opinion on the effectiveness of internal control over financial reporting while the audit report on the financial statements remains unqualified. Consequently, during the audit of the financial statements, the auditor did not rely on that control. However, he or she performed additional substantive procedures to determine whether there was a material misstatement in the account related to the control. If, as a result of these procedures, the auditor determines that there was not a material misstatement in the account, he or she would be able to express an unqualified opinion on the financial statements.

194. When the auditor's opinion on the financial statements is unaffected by the adverse opinion on the effectiveness of internal control over financial reporting, the report on internal control over financial reporting (or the combined report, if a combined report is issued) should include the following or similar language in the paragraph that describes the material weakness:

This material weakness was considered in determining the nature, timing, and extent of audit tests applied in our audit of the 20X3 financial statements, and this report does not affect our report dated [date of report] on those financial statements. [Revise this wording appropriately for use in a combined report.]

195. Such disclosure is important to ensure that users of the auditor's report on the financial statements understand why the auditor issued an unqualified opinion on those statements.

196. Disclosure is also important when the auditor's opinion on the financial statements is affected by the adverse opinion on the effectiveness of internal control over financial reporting. In that circumstance, the report on internal control over financial reporting (or the combined report, if a combined report is issued) should include the following or similar language in the paragraph that describes the material weakness:

This material weakness was considered in determining the nature, timing, and extent of audit tests applied in our audit of the 20X3 financial statements.

197. *Subsequent Discovery of Information Existing at the Date of the Auditor's Report on Internal Control Over Financial Reporting.* After the issuance of the report on internal control over financial reporting, the auditor may become aware of conditions that existed at the report date that might have affected the auditor's opinions had

he or she been aware of them. The auditor's evaluation of such subsequent information is similar to the auditor's evaluation of information discovered subsequent to the date of the report on an audit of financial statements, as described in AU sec. 561, *Subsequent Discovery of Facts Existing at the Date of the Auditor's Report*. That standard requires the auditor to determine whether the information is reliable and whether the facts existed at the date of his or her report. If so, the auditor should determine (1) whether the facts would have changed the report if he or she had been aware of them and (2) whether there are persons currently relying on or likely to rely on the auditor's report. For instance, if previously issued financial statements and the auditor's report have been recalled and reissued to reflect the correction of a misstatement, the auditor should presume that his or her report on the company's internal control over financial reporting as of same specified date also should be recalled and reissued to reflect the material weakness that existed at that date. Based on these considerations, paragraph .06 of AU sec. 561 provides detailed requirements for the auditor.

198. *Filings Under Federal Securities Statutes.* AU sec. 711, *Filings Under Federal Securities Statutes*, describes the auditor's responsibilities when an auditor's report is included in registration statements, proxy statements, or periodic reports filed under the federal securities statutes. The auditor should also apply AU sec. 711 with respect to the auditor's report on management's assessment of the effectiveness of internal control over financial reporting included in such filings. In addition, the direction in paragraph .10 of AU sec. 711 to inquire of and obtain written representations from officers and other executives responsible for financial and accounting matters about whether any events have occurred that have a material effect on the audited financial statements should be extended to matters that could have a material effect on management's assessment of internal control over financial reporting.

199. When the auditor has fulfilled these responsibilities and intends to consent to the inclusion of his or her report on management's assessment of the effectiveness of internal control over financial reporting in the securities filing, the auditor's consent should clearly indicate that both the audit report on financial statements and the audit report on management's assessment of the effectiveness of internal control over financial reporting

<sup>24</sup> See Section 10A of the Securities Exchange Act of 1934, 15 U.S.C. 78j-1.

(or both opinions if a combined report is issued) are included in his or her consent.

### **Auditor's Responsibilities for Evaluating Management's Certification Disclosures About Internal Control Over Financial Reporting**

#### *Required Management Certifications*

200. Section 302 of the Act, and Securities Exchange Act Rule 13a-14(a) or 15d-14(a), whichever applies,<sup>25</sup> requires a company's management, with the participation of the principal executive and financial officers (the certifying officers), to make the following quarterly and annual certifications with respect to the company's internal control over financial reporting:

- A statement that the certifying officers are responsible for establishing and maintaining internal control over financial reporting;
- A statement that the certifying officers have designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under their supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles; and
- A statement that the report discloses any changes in the company's internal control over financial reporting that occurred during the most recent fiscal quarter (the company's fourth fiscal quarter in the case of an annual report) that have materially affected, or are reasonably likely to materially affect, the company's internal control over financial reporting.

201. When the reason for a change in internal control over financial reporting is the correction of a material weakness, management has a responsibility to determine and the auditor should evaluate whether the reason for the change and the circumstances surrounding that change are material information necessary to make the disclosure about the change not misleading.<sup>26</sup>

#### *Auditor Evaluation Responsibilities*

202. The auditor's responsibility as it relates to management's quarterly certifications on internal control over financial reporting is different from the auditor's responsibility as it relates to management's annual assessment of

internal control over financial reporting. The auditor should perform limited procedures quarterly to provide a basis for determining whether he or she has become aware of any material modifications that, in the auditor's judgment, should be made to the disclosures about changes in internal control over financial reporting in order for the certifications to be accurate and to comply with the requirements of Section 302 of the Act.

203. To fulfill this responsibility, the auditor should perform, on a quarterly basis, the following procedures:

- Inquire of management about significant changes in the design or operation of internal control over financial reporting as it relates to the preparation of annual as well as interim financial information that could have occurred subsequent to the preceding annual audit or prior review of interim financial information;
- Evaluate the implications of misstatements identified by the auditor as part of the auditor's required review of interim financial information (*See* AU sec. 722, *Interim Financial Information*) as it relates to effective internal control over financial reporting; and
- Determine, through a combination of observation and inquiry, whether any change in internal control over financial reporting has materially affected, or is reasonably likely to materially affect, the company's internal control over financial reporting.

**Note:** Foreign private issuers filing Forms 20-F and 40-F are not subject to quarterly reporting requirements, therefore, the auditor's responsibilities would extend only to the certifications in the annual report of these companies.

204. When matters come to auditor's attention that lead him or her to believe that modification to the disclosures about changes in internal control over financial reporting is necessary for the certifications to be accurate and to comply with the requirements of Section 302 of the Act and Securities Exchange Act Rule 13a-14(a) or 15d-14(a), whichever applies,<sup>27</sup> the auditor should communicate the matter(s) to the appropriate level of management as soon as practicable.

205. If, in the auditor's judgment, management does not respond appropriately to the auditor's communication within a reasonable period of time, the auditor should inform the audit committee. If, in the auditor's judgment, the audit committee does not respond appropriately to the auditor's communication within a

reasonable period of time, the auditor should evaluate whether to resign from the engagement. The auditor should evaluate whether to consult with his or her attorney when making these evaluations. In these circumstances, the auditor also has responsibilities under AU sec. 317, *Illegal Acts by Clients*, and Section 10A of the Securities Exchange Act of 1934.<sup>28</sup> The auditor's responsibilities for evaluating the disclosures about changes in internal control over financial reporting do not diminish in any way management's responsibility for ensuring that its certifications comply with the requirements of Section 302 of the Act and Securities Exchange Act Rule 13a-14(a) or 15d-14(a), whichever applies.<sup>29</sup>

206. If matters come to the auditor's attention as a result of the audit of internal control over financial reporting that lead him or her to believe that modifications to the disclosures about changes in internal control over financial reporting (addressing changes in internal control over financial reporting occurring during the fourth quarter) are necessary for the annual certifications to be accurate and to comply with the requirements of Section 302 of the Act and Securities Exchange Act Rule 13a-14(a) or 15d-14(a), whichever applies,<sup>30</sup> the auditor should follow the same communication responsibilities as described in paragraphs 204 and 205. However, if management and the audit committee do not respond appropriately, in addition to the responsibilities described in the preceding two paragraphs, the auditor should modify his or her report on the audit of internal control over financial reporting to include an explanatory paragraph describing the reasons the auditor believes management's disclosures should be modified.

### **Required Communications in An Audit of Internal Control Over Financial Reporting**

207. The auditor must communicate in writing to management and the audit committee all significant deficiencies and material weaknesses identified during the audit. The written communication should be made prior to the issuance of the auditor's report on internal control over financial reporting. The auditor's communication should distinguish clearly between those matters considered to be significant

<sup>25</sup> See 17 CFR 240.13a-14a or 15d-14a, whichever applies.

<sup>26</sup> See Securities Exchange Act Rule 12b-20, 17 CFR 240.12b-20.

<sup>27</sup> See 17 CFR 240.13a-14(a) or 17 CFR 240.15d-14(a), whichever applies.

<sup>28</sup> See 15 U.S.C. 78j.

<sup>29</sup> See 17 CFR 240.13a-14(a) or 17 CFR 240.15d-14(a), whichever applies.

<sup>30</sup> See 17 CFR 240.13a-14(a) or 17 CFR 240.15d-14(a), whichever applies.

deficiencies and those considered to be material weaknesses, as defined in paragraphs 9 and 10, respectively.

208. If a significant deficiency or material weakness exists because the oversight of the company's external financial reporting and internal control over financial reporting by the company's audit committee is ineffective, the auditor must communicate that specific significant deficiency or material weakness in writing to the board of directors.

209. In addition, the auditor should communicate to management, in writing, all deficiencies in internal control over financial reporting (that is, those deficiencies in internal control over financial reporting that are of a lesser magnitude than significant deficiencies) identified during the audit and inform the audit committee when such a communication has been made. When making this communication, it is not necessary for the auditor to repeat information about such deficiencies that have been included in previously issued written communications, whether those communications were made by the auditor, internal auditors, or others within the organization. Furthermore, the auditor is not required to perform procedures sufficient to identify all control deficiencies; rather, the auditor should communicate deficiencies in internal control over financial reporting of which he or she is aware.

**Note:** As part of his or her evaluation of the effectiveness of internal control over financial reporting, the auditor should determine whether control deficiencies identified by internal auditors and others within the company, for example, through ongoing monitoring activities and the annual assessment of internal control over financial reporting, are reported to appropriate levels of management in a timely manner. The lack of an internal process to report deficiencies in internal control to management on a timely basis represents a control deficiency that the auditor should evaluate as to severity.

210. These written communications should state that the communication is intended solely for the information and use of the board of directors, audit committee, management, and others within the organization. When there are requirements established by governmental authorities to furnish such reports, specific reference to such regulatory agencies may be made.

211. These written communications also should include the definitions of control deficiencies, significant deficiencies, and material weaknesses and should clearly distinguish to which category the deficiencies being communicated relate.

212. Because of the potential for misinterpretation of the limited degree of assurance associated with the auditor issuing a written report representing that no significant deficiencies were noted during an audit of internal control over financial reporting, the auditor should not issue such representations.

213. When auditing internal control over financial reporting, the auditor may become aware of fraud or possible illegal acts. If the matter involves fraud, it must be brought to the attention of the appropriate level of management. If the fraud involves senior management, the auditor must communicate the matter directly to the audit committee as described in AU sec. 316, *Consideration of Fraud in a Financial Statement Audit*. If the matter involves possible illegal acts, the auditor must assure himself or herself that the audit committee is adequately informed, unless the matter is clearly inconsequential, in accordance with AU sec. 317, *Illegal Acts by Clients*. The auditor also must determine his or her responsibilities under Section 10A of the Securities Exchange Act of 1934.<sup>31</sup>

214. When timely communication is important, the auditor should communicate the preceding matters during the course of the audit rather than at the end of the engagement. The decision about whether to issue an interim communication should be determined based on the relative significance of the matters noted and the urgency of corrective follow-up action required.

#### Effective Date

215. Companies considered *accelerated filers* under Securities Exchange Act Rule 12b-2<sup>32</sup> are required to comply with the internal control reporting and disclosure requirements of Section 404 of the Act for fiscal years ending on or after November 15, 2004. (Other companies have until fiscal years ending on or after July 15, 2005, to comply with these internal control reporting and disclosure requirements.) Accordingly, independent auditors engaged to audit the financial statements of accelerated filers for fiscal years ending on or after November 15, 2004, also are required to audit and report on the company's internal control over financial reporting as of the end of such fiscal year. This standard is required to be complied with for such engagements, except as it relates to the auditor's responsibilities for evaluating management's certification disclosures about internal control over financial

reporting. The auditor's responsibilities for evaluating management's certification disclosures about internal control over financial reporting described in paragraphs 202 through 206 take effect beginning with the first quarter after the auditor's first audit report on the company's internal control over financial reporting.

216. Early compliance with this standard is permitted.

#### Appendix A—Illustrative Reports on Internal Control Over Financial Reporting

A1. Paragraphs 167 through 199 of this standard provide direction on the auditor's report on management's assessment of internal control over financial reporting. The following examples illustrate how to apply that direction in several different situations.

#### Illustrative Report

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<sup>31</sup> See 15 U.S.C. 78j-1.

<sup>32</sup> See 17 CFR 240.12b-2.

**Example A-1.—Illustrative Report Expressing an Unqualified Opinion on Management's Assessment of the Effectiveness of Internal Control Over Financial Reporting and an Unqualified Opinion on the Effectiveness of Internal Control Over Financial Reporting (Separate Report)**<sup>33</sup>

*Report of Independent Registered Public Accounting Firm*

[Introductory Paragraph]

We have audited management's assessment, included in the accompanying [title of management's report], that W Company maintained effective internal control over financial reporting as of December 31, 20X3, based on [Identify control criteria, for example, "criteria established in Internal Control—Integrated Framework issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO)."]'. W Company's management is responsible for maintaining effective internal control over financial reporting and for its assessment of the effectiveness of internal control over financial reporting. Our responsibility is to express an opinion on management's assessment and an opinion on the effectiveness of the company's internal control over financial reporting based on our audit.

[Scope Paragraph]

We conducted our audit in accordance with the standards of the Public Company Accounting Oversight Board (United States). Those standards require that we plan and perform the audit to obtain reasonable assurance about whether effective internal control over financial reporting was maintained in all material respects. Our audit included obtaining an understanding of internal control over financial reporting, evaluating management's assessment, testing and evaluating the design and operating effectiveness of internal control, and performing such other procedures as we considered necessary in the circumstances. We believe that our audit provides a reasonable basis for our opinion.

[Definition Paragraph]

A company's internal control over financial reporting is a process designed to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles. A company's internal control over financial reporting includes those policies and procedures that (1) pertain to the maintenance of records that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the company; (2) provide reasonable assurance that transactions are recorded as

necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the company are being made only in accordance with authorizations of management and directors of the company; and (3) provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use, or disposition of the company's assets that could have a material effect on the financial statements.

[Inherent Limitations Paragraph]

Because of its inherent limitations, internal control over financial reporting may not prevent or detect misstatements. Also, projections of any evaluation of effectiveness to future periods are subject to the risk that controls may become inadequate because of changes in conditions, or that the degree of compliance with the policies or procedures may deteriorate.

[Opinion Paragraph]

In our opinion, management's assessment that W Company maintained effective internal control over financial reporting as of December 31, 20X3, is fairly stated, in all material respects, based on [Identify control criteria, for example, "criteria established in Internal Control—Integrated Framework issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO)."]'. Also in our opinion, W Company maintained, in all material respects, effective internal control over financial reporting as of December 31, 20X3, based on [Identify control criteria, for example, "criteria established in Internal Control—Integrated Framework issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO)."]'.

[Explanatory Paragraph]

We have also audited, in accordance with the standards of the Public Company Accounting Oversight Board (United States), the [identify financial statements] of W Company and our report dated [date of report, which should be the same as the date of the report on the effectiveness of internal control over financial reporting] expressed [include nature of opinion].

[Signature]

[City and State or Country]

[Date]

**Example A-2.—Illustrative Report Expressing an Unqualified Opinion on Management's Assessment of the Effectiveness of Internal Control Over Financial Reporting and an Adverse Opinion on the Effectiveness of Internal Control Over Financial Reporting Because of the Existence of a Material Weakness**

*Report of Independent Registered Public Accounting Firm*

[Introductory Paragraph]

We have audited management's assessment, included in the accompanying [title of management's report], that W Company did not maintain effective internal control over financial reporting as of December 31, 20X3, because of the effect of [material weakness identified in

management's assessment], based on [Identify criteria, for example, "criteria established in Internal Control—Integrated Framework issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO)."]'. W Company's management is responsible for maintaining effective internal control over financial reporting and for its assessment of the effectiveness of internal control over financial reporting. Our responsibility is to express an opinion on management's assessment and an opinion on the effectiveness of the company's internal control over financial reporting based on our audit.

[Scope Paragraph]

We conducted our audit in accordance with the standards of the Public Company Accounting Oversight Board (United States). Those standards require that we plan and perform the audit to obtain reasonable assurance about whether effective internal control over financial reporting was maintained in all material respects. Our audit included obtaining an understanding of internal control over financial reporting, evaluating management's assessment, testing and evaluating the design and operating effectiveness of internal control, and performing such other procedures as we considered necessary in the circumstances. We believe that our audit provides a reasonable basis for our opinion.

[Definition Paragraph]

A company's internal control over financial reporting is a process designed to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles. A company's internal control over financial reporting includes those policies and procedures that (1) pertain to the maintenance of records that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the company; (2) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the company are being made only in accordance with authorizations of management and directors of the company; and (3) provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use, or disposition of the company's assets that could have a material effect on the financial statements.

[Inherent Limitations Paragraph]

Because of its inherent limitations, internal control over financial reporting may not prevent or detect misstatements. Also, projections of any evaluation of effectiveness to future periods are subject to the risk that controls may become inadequate because of changes in conditions, or that the degree of compliance with the policies or procedures may deteriorate.

<sup>33</sup> If the auditor issues separate reports on the audit of internal control over financial reporting and the audit of the financial statements, both reports should include a statement that the audit was conducted in accordance with standards of the Public Company Accounting Oversight Board (United States).

**[Explanatory Paragraph]**

A material weakness is a control deficiency, or combination of control deficiencies, that results in more than a remote likelihood that a material misstatement of the annual or interim financial statements will not be prevented or detected. The following material weakness has been identified and included in management's assessment. *[Include a description of the material weakness and its effect on the achievement of the objectives of the control criteria.]* This material weakness was considered in determining the nature, timing, and extent of audit tests applied in our audit of the 20X3 financial statements, and this report does not affect our report dated *[date of report, which should be the same as the date of this report on internal control]* on those financial statements.<sup>34</sup>

**[Opinion Paragraph]**

In our opinion, management's assessment that W Company did not maintain effective internal control over financial reporting as of December 31, 20X3, is fairly stated, in all material respects, based on *[Identify control criteria, for example, "criteria established in Internal Control—Integrated Framework issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO)."]*. Also, in our opinion, because of the effect of the material weakness described above on the achievement of the objectives of the control criteria, W Company has not maintained effective internal control over financial reporting as of December 31, 20X3, based on *[Identify control criteria, for example, "criteria established in Internal Control—Integrated Framework issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO)."]*.

*[Signature]*

*[City and State or Country]*

*[Date]*

**Example A-3.—Illustrative Report Expressing a Qualified Opinion on Management's Assessment of the Effectiveness of Internal Control Over Financial Reporting and a Qualified Opinion on the Effectiveness of Internal Control Over Financial Reporting Because of a Limitation on the Scope of the Audit**

*Report of Independent Registered Public Accounting Firm*

**[Introductory Paragraph]**

We have audited management's assessment, included in the accompanying *[title of management's report]*, that W Company maintained effective internal control over financial reporting as of December 31, 20X3, based on *[Identify control criteria, for example, "criteria established in Internal Control—Integrated Framework issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO)."]*. W Company's management is responsible for maintaining effective internal control over financial

reporting and for its assessment of the effectiveness of internal control over financial reporting. Our responsibility is to express an opinion on management's assessment and an opinion on the effectiveness of the company's internal control over financial reporting based on our audit.

**[Scope Paragraph]**

Except as described below, we conducted our audit in accordance the standards of the Public Company Accounting Oversight Board (United States). Those standards require that we plan and perform the audit to obtain reasonable assurance about whether effective internal control over financial reporting was maintained in all material respects. Our audit included obtaining an understanding of internal control over financial reporting, evaluating management's assessment, testing and evaluating the design and operating effectiveness of internal control, and performing such other procedures as we considered necessary in the circumstances. We believe that our audit provides a reasonable basis for our opinion.

**[Explanatory Paragraph That Describes Scope Limitation]**

A material weakness is a control deficiency, or combination of control deficiencies, that results in more than a remote likelihood that a material misstatement of the annual or interim financial statements will not be prevented or detected. The following material weakness has been identified and included in management's assessment.<sup>35</sup> Prior to December 20, 20X3, W Company had an inadequate system for recording cash receipts, which could have prevented the Company from recording cash receipts on accounts receivable completely and properly. Therefore, cash received could have been diverted for unauthorized use, lost, or otherwise not properly recorded to accounts receivable. We believe this condition was a material weakness in the design or operation of the internal control of W Company in effect prior to December 20, 20X3. Although the Company implemented a new cash receipts system on December 20, 20X3, the system has not been in operation for a sufficient period of time to enable us to obtain sufficient evidence about its operating effectiveness.

**[Definition Paragraph]**

A company's internal control over financial reporting is a process designed to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles. A company's internal control over financial reporting includes those policies and procedures that (1) pertain to the maintenance of records that, in reasonable

detail, accurately and fairly reflect the transactions and dispositions of the assets of the company; (2) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the company are being made only in accordance with authorizations of management and directors of the company; and (3) provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use, or disposition of the company's assets that could have a material effect on the financial statements.

**[Inherent Limitations Paragraph]**

Because of its inherent limitations, internal control over financial reporting may not prevent or detect misstatements. Also, projections of any evaluation of effectiveness to future periods are subject to the risk that controls may become inadequate because of changes in conditions, or that the degree of compliance with the policies or procedures may deteriorate.

**[Opinion Paragraph]**

In our opinion, except for the effect of matters we might have discovered had we been able to examine evidence about the effectiveness of the new cash receipts system, management's assessment that W Company maintained effective internal control over financial reporting as of December 31, 20X3, is fairly stated, in all material respects, based on *[Identify control criteria, for example, "criteria established in Internal Control—Integrated Framework issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO)."]*. Also, in our opinion, except for the effect of matters we might have discovered had we been able to examine evidence about the effectiveness of the new cash receipts system, W Company maintained, in all material respects, effective internal control over financial reporting as of December 31, 20X3, based on *[Identify control criteria, for example, "criteria established in Internal Control—Integrated Framework issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO)."]*.

**[Explanatory Paragraph]**

We have also audited, in accordance with the standards of the Public Company Accounting Oversight Board (United States), the *[identify financial statements]* of W Company and our report dated *[date of report, which should be the same as the date of the report on the effectiveness of internal control over financial reporting]* expressed *[include nature of opinion]*.

*[Signature]*

*[City and State or Country]*

*[Date]*

<sup>34</sup> Modify this sentence when the auditor's opinion on the financial statements is affected by the adverse opinion on the effectiveness of internal control over financial reporting, as described in paragraph 196.

<sup>35</sup> If the auditor has identified a material weakness that is not included in management's assessment, add the following wording to the report: "In addition, we have identified the following material weakness that has not been identified as a material weakness in management's assessment."

**Example A-4.—Illustrative Report Disclaiming an Opinion on Management's Assessment of the Effectiveness of Internal Control Over Financial Reporting and Disclaiming an Opinion on the Effectiveness of Internal Control Over Financial Reporting Because of a Limitation on the Scope of the Audit**

*Report of Independent Registered Public Accounting Firm*

[Introductory Paragraph]

We were engaged to audit management's assessment included in the accompanying [title of management's report] that W Company maintained effective internal control over financial reporting as of December 31, 20X3 based on [Identify control criteria, for example, "criteria established in Internal Control—Integrated Framework issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO)."]. W Company's management is responsible for maintaining effective internal control over financial reporting and for its assessment of the effectiveness of internal control over financial reporting.

[Omit Scope Paragraph]

[Explanatory paragraph that describes scope limitation]<sup>36</sup>

[Definition Paragraph]

A company's internal control over financial reporting is a process designed to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles. A company's internal control over financial reporting includes those policies and procedures that (1) pertain to the maintenance of records that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the company; (2) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the company are being made only in accordance with authorizations of management and directors of the company; and (3) provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use, or disposition of the company's assets that could have a material effect on the financial statements.

[Inherent Limitations Paragraph]

Because of its inherent limitations, internal control over financial reporting may not prevent or detect misstatements. Also, projections of any evaluation of effectiveness to future periods are subject to the risk that controls may become inadequate because of changes in conditions, or that the degree of

compliance with the policies or procedures may deteriorate.

[Opinion Paragraph]

Since management [describe scope restrictions] and we were unable to apply other procedures to satisfy ourselves as to the effectiveness of the company's internal control over financial reporting, the scope of our work was not sufficient to enable us to express, and we do not express, an opinion either on management's assessment or on the effectiveness of the company's internal control over financial reporting.

[Explanatory Paragraph]

We have also audited, in accordance with the standards of the Public Company Accounting Oversight Board (United States), the [identify financial statements] of W Company and our report dated [date of report, which should be the same as the date of the report on the effectiveness of internal control over financial reporting] expressed [include nature of opinion].

[Signature]

[City and State or Country]

[Date]

**Example A-5.—Illustrative Report Expressing an Unqualified Opinion on Management's Assessment of the Effectiveness of Internal Control Over Financial Reporting That Refers to the Report of Other Auditors as a Basis, in Part, for the Auditor's Opinion and an Unqualified Opinion on the Effectiveness of Internal Control Over Financial Reporting**

*Report of Independent Registered Public Accounting Firm*

[Introductory Paragraph]

We have audited management's assessment, included in the accompanying [title of management's report], that W Company maintained effective internal control over financial reporting as of December 31, 20X3, based on [Identify control criteria, for example, "criteria established in Internal Control—Integrated Framework issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO)."]. W Company's management is responsible for maintaining effective internal control over financial reporting and for its assessment of the effectiveness of internal control over financial reporting. Our responsibility is to express an opinion on management's assessment and an opinion on the effectiveness of the company's internal control over financial reporting based on our audit. We did not examine the effectiveness of internal control over financial reporting of B Company, a wholly owned subsidiary, whose financial statements reflect total assets and revenues constituting 20 and 30 percent, respectively, of the related consolidated financial statement amounts as of and for the year ended December 31, 20X3. The effectiveness of B Company's internal control over financial reporting was audited by other auditors whose report has been furnished to us, and our opinion, insofar as it relates to the effectiveness of B Company's internal control over financial reporting, is based solely on the report of the other auditors.

[Scope Paragraph]

We conducted our audit in accordance with the standards of the Public Company Accounting Oversight Board (United States). Those standards require that we plan and perform the audit to obtain reasonable assurance about whether effective internal control over financial reporting was maintained in all material respects. Our audit included obtaining an understanding of internal control over financial reporting, evaluating management's assessment, testing and evaluating the design and operating effectiveness of internal control, and performing such other procedures as we considered necessary in the circumstances. We believe that our audit and the report of the other auditors provide a reasonable basis for our opinion.

[Definition Paragraph]

A company's internal control over financial reporting is a process designed to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles. A company's internal control over financial reporting includes those policies and procedures that (1) pertain to the maintenance of records that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the company; (2) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the company are being made only in accordance with authorizations of management and directors of the company; and (3) provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use, or disposition of the company's assets that could have a material effect on the financial statements.

[Inherent Limitations Paragraph]

Because of its inherent limitations, internal control over financial reporting may not prevent or detect misstatements. Also, projections of any evaluation of effectiveness to future periods are subject to the risk that controls may become inadequate because of changes in conditions, or that the degree of compliance with the policies or procedures may deteriorate.

[Opinion Paragraph]

In our opinion, based on our audit and the report of the other auditors, management's assessment that W Company maintained effective internal control over financial reporting as of December 31, 20X3, is fairly stated, in all material respects, based on [Identify control criteria, for example, "criteria established in Internal Control—Integrated Framework issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO)."]. Also, in our opinion, based on our audit and the report of the other auditors, W Company maintained, in all material respects, effective internal control over financial reporting as of December 31, 20X3, based on [Identify

<sup>36</sup> If, through the limited procedures performed, the auditor concludes that a material weakness exists, the auditor should add the definition of material weakness (as provided in paragraph 10) to the explanatory paragraph. In addition, the auditor should include a description of the material weakness and its effect on the achievement of the objectives of the control criteria.

control criteria, for example, criteria established in Internal Control—Integrated Framework issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO).’].

[Explanatory Paragraph]

We have also audited, in accordance with the standards of the Public Company Accounting Oversight Board (United States), the [identify financial statements] of W Company and our report dated [date of report, which should be the same as the date of the report on the effectiveness of internal control over financial reporting] expressed [include nature of opinion].

[Signature]

[City and State or Country]

[Date]

**Example A-6.—Illustrative Report Expressing an Adverse Opinion on Management’s Assessment of the Effectiveness of Internal Control Over Financial Reporting and an Adverse Opinion on the Effectiveness of Internal Control Over Financial Reporting Because of the Existence of a Material Weakness**

*Report of Independent Registered Public Accounting Firm*

[Introductory Paragraph]

We have audited management’s assessment, included in the accompanying [title of management’s report], that W Company maintained effective internal control over financial reporting as of December 31, 20X3, based on [Identify control criteria, for example, “criteria established in Internal Control—Integrated Framework issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO).’]. W Company’s management is responsible for maintaining effective internal control over financial reporting and for its assessment of the effectiveness of internal control over financial reporting. Our responsibility is to express an opinion on management’s assessment and an opinion on the effectiveness of the company’s internal control over financial reporting based on our audit.

[Scope Paragraph]

We conducted our audit in accordance with the standards of the Public Company Accounting Oversight Board (United States). Those standards require that we plan and perform the audit to obtain reasonable assurance about whether effective internal control over financial reporting was maintained in all material respects. Our audit included obtaining an understanding of internal control over financial reporting, evaluating management’s assessment, testing and evaluating the design and operating effectiveness of internal control, and performing such other procedures as we considered necessary in the circumstances. We believe that our audit provides a reasonable basis for our opinion.

[Definition Paragraph]

A company’s internal control over financial reporting is a process designed to provide reasonable assurance regarding the

reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles. A company’s internal control over financial reporting includes those policies and procedures that (1) pertain to the maintenance of records that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the company; (2) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the company are being made only in accordance with authorizations of management and directors of the company; and (3) provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use, or disposition of the company’s assets that could have a material effect on the financial statements.

[Inherent Limitations Paragraph]

Because of its inherent limitations, internal control over financial reporting may not prevent or detect misstatements. Also, projections of any evaluation of effectiveness to future periods are subject to the risk that controls may become inadequate because of changes in conditions, or that the degree of compliance with the policies or procedures may deteriorate.

[Explanatory Paragraph]

A material weakness is a control deficiency, or combination of control deficiencies, that results in more than a remote likelihood that a material misstatement of the annual or interim financial statements will not be prevented or detected. We have identified the following material weakness that has not been identified as a material weakness in management’s assessment [Include a description of the material weakness and its effect on the achievement of the objectives of the control criteria.] This material weakness was considered in determining the nature, timing, and extent of audit tests applied in our audit of the 20X3 financial statements, and this report does not affect our report dated [date of report, which should be the same as the date of this report on internal control] on those financial statements.<sup>37</sup>

[Opinion Paragraph]

In our opinion, because of the effect of the material weakness described above on the achievement of the objectives of the control criteria, management’s assessment that W Company maintained effective internal control over financial reporting as of December 31, 20X3, is not fairly stated, in all material respects, based on [Identify control criteria, for example, “criteria established in Internal Control—Integrated Framework issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO).’]. Also, in our opinion, because of

the effect of the material weakness described above on the achievement of the objectives of the control criteria, W Company has not maintained effective internal control over financial reporting as of December 31, 20X3, based on [Identify control criteria, for example, “criteria established in Internal Control—Integrated Framework issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO).’].

[Signature]

[City and State or Country]

[Date]

**Example A-7.—Illustrative Combined Report Expressing an Unqualified Opinion on Financial Statements, an Unqualified Opinion on Management’s Assessment of the Effectiveness of Internal Control Over Financial Reporting and an Unqualified Opinion on the Effectiveness of Internal Control Over Financial Reporting**

*Report of Independent Registered Public Accounting Firm*

[Introductory Paragraph]

We have audited the accompanying balance sheets of W Company as of December 31, 20X3 and 20X2, and the related statements of income, stockholders’ equity and comprehensive income, and cash flows for each of the years in the three-year period ended December 31, 20X3. We also have audited management’s assessment, included in the accompanying [title of management’s report], that W Company maintained effective internal control over financial reporting as of December 31, 20X3, based on [Identify control criteria, for example, “criteria established in Internal Control—Integrated Framework issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO).’]. W Company’s management is responsible for these financial statements, for maintaining effective internal control over financial reporting, and for its assessment of the effectiveness of internal control over financial reporting. Our responsibility is to express an opinion on these financial statements, an opinion on management’s assessment, and an opinion on the effectiveness of the company’s internal control over financial reporting based on our audits.

[Scope Paragraph]

We conducted our audits in accordance with the standards of the Public Company Accounting Oversight Board (United States). Those standards require that we plan and perform the audits to obtain reasonable assurance about whether the financial statements are free of material misstatement and whether effective internal control over financial reporting was maintained in all material respects. Our audit of financial statements included examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements, assessing the accounting principles used and significant estimates made by management, and evaluating the overall financial statement presentation. Our audit of internal control over financial reporting included obtaining an understanding of internal control over financial reporting, evaluating management’s

<sup>37</sup> Modify this sentence when the auditor’s opinion on the financial statements is affected by the adverse opinion on the effectiveness of internal control over financial reporting.

assessment, testing and evaluating the design and operating effectiveness of internal control, and performing such other procedures as we considered necessary in the circumstances. We believe that our audits provide a reasonable basis for our opinions.

[Definition Paragraph]

A company's internal control over financial reporting is a process designed to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles. A company's internal control over financial reporting includes those policies and procedures that (1) pertain to the maintenance of records that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the company; (2) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the company are being made only in accordance with authorizations of management and directors of the company; and (3) provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use, or disposition of the company's assets that could have a material effect on the financial statements.

[Inherent Limitations Paragraph]

Because of its inherent limitations, internal control over financial reporting may not prevent or detect misstatements. Also, projections of any evaluation of effectiveness to future periods are subject to the risk that controls may become inadequate because of changes in conditions, or that the degree of compliance with the policies or procedures may deteriorate.

[Opinion Paragraph]

In our opinion, the financial statements referred to above present fairly, in all material respects, the financial position of W Company as of December 31, 20X3 and 20X2, and the results of its operations and its cash flows for each of the years in the three-year period ended December 31, 20X3 in conformity with accounting principles generally accepted in the United States of America. Also in our opinion, management's assessment that W Company maintained effective internal control over financial reporting as of December 31, 20X3, is fairly stated, in all material respects, based on *[Identify control criteria, for example, "criteria established in Internal Control—Integrated Framework issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO)."]*. Furthermore, in our opinion, W Company maintained, in all material respects, effective internal control over financial reporting as of December 31, 20X3, based on *[Identify control criteria, for example, "criteria established in Internal Control—Integrated Framework issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO)."]*.

[Signature]

*[City and State or Country]*

*[Date]*

**Appendix B—Additional Performance Requirements and Directions; Extent-of-Testing Examples**

**Tests To Be Performed When a Company Has Multiple Locations or Business Units**

B1. To determine the locations or business units for performing audit procedures, the auditor should evaluate their relative financial significance and the risk of material misstatement arising from them. In making this evaluation, the auditor should identify the locations or business units that are individually important, evaluate their documentation of controls, and test controls over significant accounts and disclosures. For locations or business units that contain specific risks that, by themselves, could create a material misstatement, the auditor should evaluate their documentation of controls and test controls over the specific risks.

B2. The auditor should determine the other locations or business units that, when aggregated, represent a group with a level of financial significance that could create a material misstatement in the financial statements. For that group, the auditor should determine whether there are company-level controls in place. If so, the auditor should evaluate the documentation and test such company-level controls. If not, the auditor should perform tests of controls at some of the locations or business units.

B3. No further work is necessary on the remaining locations or businesses, provided that they are not able to create, either individually or in the aggregate, a material misstatement in the financial statements.

*Locations or Business Units That Are Financially Significant*

B4. Because of the importance of financially significant locations or business units, the auditor should evaluate management's documentation of and perform tests of controls over all relevant assertions related to significant accounts and disclosures at each financially significant location or business unit, as discussed in paragraphs 83 through 105. Generally, a relatively small number of locations or business units will encompass a large portion of a company's operations and financial position, making them financially significant.

B5. In determining the nature, timing, and extent of testing at the individual locations or business units, the auditor should evaluate each entity's involvement, if any, with a central processing or shared service environment.

*Locations or Business Units That Involve Specific Risks*

B6. Although a location or business unit might not be individually financially significant, it might present specific risks that, by themselves, could create a material misstatement in the company's financial statements. The auditor should test the controls over the specific risks that could create a material misstatement in the company's financial statements. The auditor need not test controls over all relevant

assertions related to all significant accounts at these locations or business units. For example, a business unit responsible for foreign exchange trading could expose the company to the risk of material misstatement, even though the relative financial significance of such transactions is low.

*Locations or Business Units That Are Significant Only When Aggregated With Other Locations and Business Units*

B7. In determining the nature, timing, and extent of testing, the auditor should determine whether management has documented and placed in operation company-level controls (See paragraph 53) over individually unimportant locations and business units that, when aggregated with other locations or business units, might have a high level of financial significance. A high level of financial significance could create a greater than remote risk of material misstatement of the financial statements.

B8. For the purposes of this evaluation, company-level controls are controls management has in place to provide assurance that appropriate controls exist throughout the organization, including at individual locations or business units.

B9. The auditor should perform tests of company-level controls to determine whether such controls are operating effectively. The auditor might conclude that he or she cannot evaluate the operating effectiveness of such controls without visiting some or all of the locations or business units.

B10. If management does not have company-level controls operating at these locations and business units, the auditor should determine the nature, timing, and extent of procedures to be performed at each location, business unit, or combination of locations and business units. When determining the locations or business units to visit and the controls to test, the auditor should evaluate the following factors:

- The relative financial significance of each location or business unit.
- The risk of material misstatement arising from each location or business unit.
- The similarity of business operations and internal control over financial reporting at the various locations or business units.
- The degree of centralization of processes and financial reporting applications.
- The effectiveness of the control environment, particularly management's direct control over the exercise of authority delegated to others and its ability to effectively supervise activities at the various locations or business units. An ineffective control environment over the locations or business units might constitute a material weakness.
- The nature and amount of transactions executed and related assets at the various locations or business units.
- The potential for material unrecognized obligations to exist at a location or business unit and the degree to which the location or business unit could create an obligation on the part of the company.
- Management's risk assessment process and analysis for excluding a location or business unit from its assessment of internal control over financial reporting.

B11. Testing company-level controls is not a substitute for the auditor's testing of controls over a large portion of the company's operations or financial position. If the auditor cannot test a large portion of the company's operations and financial position by selecting a relatively small number of locations or business units, he or she should expand the number of locations or business units selected to evaluate internal control over financial reporting.

**Note:** The evaluation of whether controls over a large portion of the company's operations or financial position have been tested should be made at the overall level, not at the individual significant account level.

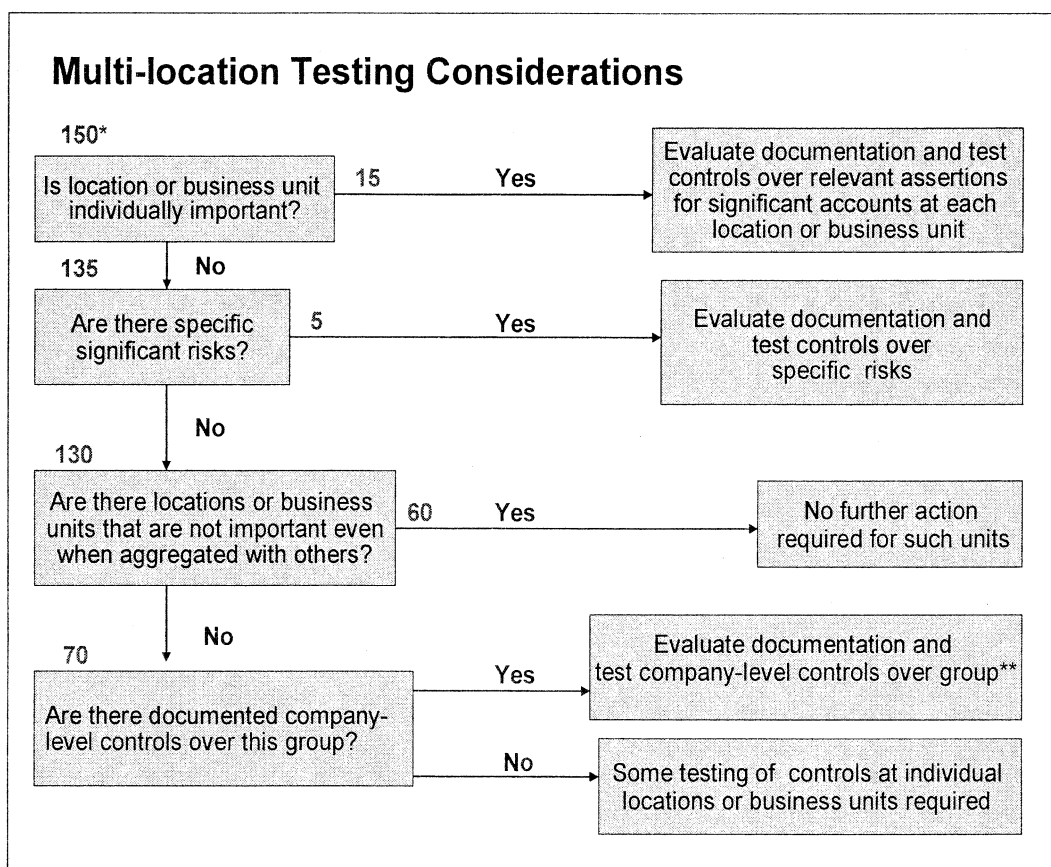
*Locations and Business Units That Do Not Require Testing*

B12. No testing is required for locations or business units that individually, and when aggregated with others, could not result in a

material misstatement to the financial statements.

*Multi-Location Testing Considerations Flowchart*

B13. Illustration B-1 depicts how to apply the directions in this section to a hypothetical company with 150 locations or business units, along with the auditor's testing considerations for those locations or business units.



\* Numbers represent number of locations affected.

\*\* See paragraph B7.

*Special Situations*

B14. The scope of the evaluation of the company's internal control over financial reporting should include entities that are acquired on or before the date of management's assessment and operations that are accounted for as discontinued operations on the date of management's assessment. The auditor should consider this multiple locations discussion in determining whether it will be necessary to test controls at these entities or operations.

B15. For equity method investments, the evaluation of the company's internal control over financial reporting should include controls over the reporting in accordance with generally accepted accounting principles, in the company's financial

statements, of the company's portion of the investees' income or loss, the investment balance, adjustments to the income or loss and investment balance, and related disclosures. The evaluation ordinarily would not extend to controls at the equity method investee.

B16. In situations in which the SEC allows management to limit its assessment of internal control over financial reporting by excluding certain entities, the auditor may limit the audit in the same manner and report without reference to the limitation in scope. However, the auditor should evaluate the reasonableness of management's conclusion that the situation meets the criteria of the SEC's allowed exclusion and the appropriateness of any required disclosure related to such a limitation. If the auditor

believes that management's disclosure about the limitation requires modification, the auditor should follow the same communication responsibilities as described in paragraphs 204 and 205. If management and the audit committee do not respond appropriately, in addition to fulfilling those responsibilities, the auditor should modify his or her report on the audit of internal control over financial reporting to include an explanatory paragraph describing the reasons why the auditor believes management's disclosure should be modified.

B17. For example, for entities that are consolidated or proportionately consolidated, the evaluation of the company's internal control over financial reporting should include controls over significant accounts and processes that exist at the consolidated

or proportionately consolidated entity. In some instances, however, such as for some variable interest entities as defined in Financial Accounting Standards Board Interpretation No. 46, *Consolidation of Variable Interest Entities*, management might not be able to obtain the information necessary to make an assessment because it does not have the ability to control the entity. If management is allowed to limit its assessment by excluding such entities,<sup>38</sup> the auditor may limit the audit in the same manner and report without reference to the limitation in scope. In this case, the evaluation of the company's internal control over financial reporting should include evaluation of controls over the reporting in accordance with generally accepted accounting principles, in the company's financial statements, of the company's portion of the entity's income or loss, the investment balance, adjustments to the income or loss and investment balances, and related disclosures. However, the auditor should evaluate the reasonableness of management's conclusion that it does not have the ability to obtain the necessary information as well as the appropriateness of any required disclosure related to such a limitation.

#### Use of Service Organizations

B18. AU sec. 324, *Service Organizations*, applies to the audit of financial statements of a company that obtains services from another organization that are part of its information system. The auditor may apply the relevant concepts described in AU sec. 324 to the audit of internal control over financial reporting. Further, although AU sec. 324 was designed to address auditor-to-auditor communications as part of the audit of financial statements, it also is appropriate for management to apply the relevant concepts described in that standard to its assessment of internal control over financial reporting.

B19. Paragraph .03 of AU sec. 324 describes the situation in which a service organization's services are part of a company's information system. If the service organization's services are part of a company's information system, as described therein, then they are part of the information and communication component of the company's internal control over financial reporting. When the service organization's services are part of the company's internal control over financial reporting, management

should consider the activities of the service organization in making its assessment of internal control over financial reporting, and the auditor should consider the activities of the service organization in determining the evidence required to support his or her opinion.

**Note:** The use of a service organization does not reduce management's responsibility to maintain effective internal control over financial reporting.

B20. Paragraphs .07 through .16 in AU sec. 324 describe the procedures that management and the auditor should perform with respect to the activities performed by the service organization. The procedures include:

- a. Obtaining an understanding of the controls at the service organization that are relevant to the entity's internal control and the controls at the user organization over the activities of the service organization, and
- b. Obtaining evidence that the controls that are relevant to management's assessment and the auditor's opinion are operating effectively.

B21. Evidence that the controls that are relevant to management's assessment and the auditor's opinion are operating effectively may be obtained by following the procedures described in paragraph .12 of AU sec. 324. These procedures include:

- a. Performing tests of the user organization's controls over the activities of the service organization (for example, testing the user organization's independent repurchase of selected items processed by the service organization or testing the user organization's reconciliation of output reports with source documents).
- b. Performing tests of controls at the service organization.
- c. Obtaining a service auditor's report on controls placed in operation and tests of operating effectiveness, or a report on the application of agreed-upon procedures that describes relevant tests of controls.

**Note:** The service auditor's report referred to above means a report with the service auditor's opinion on the service organization's description of the design of its controls, the tests of controls, and results of those tests performed by the service auditor, and the service auditor's opinion on whether the controls tested were operating effectively during the specified period (in other words, "reports on controls placed in operation and tests of operating effectiveness" described in paragraph .24b of AU sec. 324). A service auditor's report that does not include tests of controls, results of the tests, and the service auditor's opinion on operating effectiveness (in other words, "reports on controls placed in operation" described in paragraph .24a of AU sec. 324) does not provide evidence of operating effectiveness. Furthermore, if the evidence regarding operating effectiveness of controls comes from an agreed-upon procedures report rather than a service auditor's report issued pursuant to AU sec. 324, management and the auditor should evaluate whether the agreed-upon procedures report provides sufficient evidence in the same manner described in the following paragraph.

B22. If a service auditor's report on controls placed in operation and tests of operating effectiveness is available, management and the auditor may evaluate whether this report provides sufficient evidence to support the assessment and opinion, respectively. In evaluating whether such a service auditor's report provides sufficient evidence, management and the auditor should consider the following factors:

- The time period covered by the tests of controls and its relation to the date of management's assessment,
- The scope of the examination and applications covered, the controls tested, and the way in which tested controls relate to the company's controls,
- The results of those tests of controls and the service auditor's opinion on the operating effectiveness of the controls.

**Note:** These factors are similar to factors the auditor would consider in determining whether the report provides sufficient evidence to support the auditor's assessed level of control risk in an audit of the financial statements as described in paragraph .16 of AU sec. 324.

B23. If the service auditor's report on controls placed in operation and tests of operating effectiveness contains a qualification that the stated control objectives might be achieved only if the company applies controls contemplated in the design of the system by the service organization, the auditor should evaluate whether the company is applying the necessary procedures. For example, completeness of processing payroll transactions might depend on the company's validation that all payroll records sent to the service organization were processed by checking a control total.

B24. In determining whether the service auditor's report provides sufficient evidence to support management's assessment and the auditor's opinion, management and the auditor should make inquiries concerning the service auditor's reputation, competence, and independence. Appropriate sources of information concerning the professional reputation of the service auditor are discussed in paragraph .10a of AU sec. 543, *Part of Audit Performed by Other Independent Auditors*.

B25. When a significant period of time has elapsed between the time period covered by the tests of controls in the service auditor's report and the date of management's assessment, additional procedures should be performed. The auditor should inquire of management to determine whether management has identified any changes in the service organization's controls subsequent to the period covered by the service auditor's report (such as changes communicated to management from the service organization, changes in personnel at the service organization with whom management interacts, changes in reports or other data received from the service organization, changes in contracts or service level agreements with the service organization, or errors identified in the service organization's processing). If management has identified such changes, the auditor should determine whether management has performed procedures to

<sup>38</sup> It is our understanding that the SEC Staff may conclude that management can limit the scope of its assessment if it does not have the authority to affect, and therefore cannot assess, the controls in place over certain amounts. This would relate to entities that are consolidated or proportionately consolidated when the issuer does not have sufficient control over the entity to assess and affect controls. If management's report on its assessment of the effectiveness of internal control over financial reporting is limited in that manner, the SEC staff may permit the company to disclose this fact as well as information about the magnitude of the amounts included in the financial statements from entities whose controls cannot be assessed. This disclosure would be required in each filing, but outside of management's report on its assessment of the effectiveness of internal control over financial reporting.

evaluate the effect of such changes on the effectiveness of the company's internal control over financial reporting. The auditor also should consider whether the results of other procedures he or she performed indicate that there have been changes in the controls at the service organization that management has not identified.

B26. The auditor should determine whether to obtain additional evidence about the operating effectiveness of controls at the service organization based on the procedures performed by management or the auditor and the results of those procedures and on an evaluation of the following factors. As these factors increase in significance, the need for the auditor to obtain additional evidence increases.

- The elapsed time between the time period covered by the tests of controls in the service auditor's report and the date of management's assessment,
- The significance of the activities of the service organization,
- Whether there are errors that have been identified in the service organization's processing, and
- The nature and significance of any changes in the service organization's controls identified by management or the auditor.

B27. If the auditor concludes that additional evidence about the operating effectiveness of controls at the service organization is required, the auditor's additional procedures may include:

- Evaluating the procedures performed by management and the results of those procedures.
- Contacting the service organization, through the user organization, to obtain specific information.
- Requesting that a service auditor be engaged to perform procedures that will supply the necessary information.
- Visiting the service organization and performing such procedures.

B28. *Based on the evidence obtained, management and the auditor should determine whether they have obtained sufficient evidence to obtain the reasonable assurance necessary for their assessment and opinion, respectively.*

B29. *The auditor should not refer to the service auditor's report when expressing an opinion on internal control over financial reporting.*

#### Examples of Extent-of-Testing Decisions

B30. As discussed throughout this standard, determining the effectiveness of a company's internal control over financial reporting includes evaluating the design and operating effectiveness of controls over all relevant assertions related to all significant accounts and disclosures in the financial statements. Paragraphs 88 through 107 provide the auditor with directions about the nature, timing, and extent of testing of the design and operating effectiveness of internal control over financial reporting.

B31. Examples B-1. through B-4 illustrate how to apply this information in various situations. These examples are for illustrative purposes only.

#### *Example B-1.—Daily Programmed Application Control and Daily Information Technology-Dependent Manual Control*

The auditor has determined that cash and accounts receivable are significant accounts to the audit of XYZ Company's internal control over financial reporting. Based on discussions with company personnel and review of company documentation, the auditor learned that the company had the following procedures in place to account for cash received in the lockbox:

- a. The company receives a download of cash receipts from the banks.
- b. The information technology system applies cash received in the lockbox to individual customer accounts.
- c. Any cash received in the lockbox and not applied to a customer's account is listed on an exception report (Unapplied Cash Exception Report).

• Therefore, the application of cash to a customer's account is a programmed application control, while the review and follow-up of unapplied cash from the exception report is a manual control.

To determine whether misstatements in cash (existence assertion) and accounts receivable (existence, valuation, and completeness) would be prevented or detected on a timely basis, the auditor decided to test the controls provided by the system in the daily reconciliation of lock box receipts to customer accounts, as well as the control over reviewing and resolving unapplied cash in the Unapplied Cash Exception Report.

*Nature, Timing, and Extent of Procedures.* To test the programmed application control, the auditor:

- Identified, through discussion with company personnel, the software used to receive the download from the banks and to process the transactions and determined that the banks supply the download software.

—The company uses accounting software acquired from a third-party supplier. The software consists of a number of modules. The client modifies the software only for upgrades supplied by the supplier.

- Determined, through further discussion with company personnel, that the cash module operates the lockbox functionality and the posting of cash to the general ledger. The accounts receivable module posts the cash to individual customer accounts and produces the Unapplied Cash Exception Report, a standard report supplied with the package. The auditor agreed this information to the supplier's documentation.

• Identified, through discussions with company personnel and review of the supplier's documentation, the names, file sizes (in bytes), and locations of the executable files (programs) that operate the functionality under review. The auditor then identified the compilation dates of these programs and agreed them to the original installation date of the application.

- Identified the objectives of the programs to be tested. The auditor wanted to determine whether only appropriate cash items are posted to customers' accounts and matched to customer number, invoice number, amount, etc., and that there is a listing of inappropriate cash items (that is, any of the

above items not matching) on the exception report.

In addition, the auditor had evaluated and tested general computer controls, including program changes (for example, confirmation that no unauthorized changes are undertaken) and logical access (for example, data file access to the file downloaded from the banks and user access to the cash and accounts receivable modules) and concluded that they were operating effectively.

To determine whether such programmed controls were operating effectively, the auditor performed a walkthrough in the month of July. The computer controls operate in a systematic manner, therefore, the auditor concluded that it was sufficient to perform a walkthrough for only the one item. During the walkthrough, the auditor performed and documented the following items:

- a. Selected one customer and agreed the amount billed to the customer to the cash received in the lockbox.

- b. Agreed the total of the lockbox report to the posting of cash receipts in the general ledger.

- c. Agreed the total of the cash receipt download from the bank to the lockbox report and supporting documentation.

- d. Selected one customer's remittance and agreed amount posted to the customer's account in the accounts receivable subsidiary ledger.

To test the detective control of review and follow up on the Daily Unapplied Cash Exception Report, the auditor:

- a. Made inquiries of company personnel.

To understand the procedures in place to ensure that all unapplied items are resolved, the time frame in which such resolution takes place, and whether unapplied items are handled properly within the system, the auditor discussed these matters with the employee responsible for reviewing and resolving the Daily Unapplied Cash Exception Reports. The auditor learned that, when items appear on the Daily-Unapplied Cash Exception Report, the employee must manually enter the correction into the system. The employee typically performs the resolution procedures the next business day. Items that typically appear on the Daily Unapplied Cash Exception Report relate to payments made by a customer without reference to an invoice number/purchase order number or to underpayments of an invoice due to quantity or pricing discrepancies.

- b. Observed personnel performing the control. The auditor then observed the employee reviewing and resolving a Daily Unapplied Cash Exception Report. The day selected contained four exceptions—three related to payments made by a customer without an invoice number, and one related to an underpayment due to a pricing discrepancy.

- For the pricing discrepancy, the employee determined, through discussions with a sales person, that the customer had been billed an incorrect price; a price break that the sales person had granted to the customer was not reflected on the customer's invoice. The employee resolved the pricing discrepancy, determined which invoices were being paid, and entered a correction

into the system to properly apply cash to the customer's account and reduce accounts receivable and sales accounts for the amount of the price break.

c. Reperformed the control. Finally, the auditor selected 25 Daily Unapplied Cash Exception Reports from the period January to September. For the reports selected, the auditor reperformed the follow-up procedures that the employee performed. For instance, the auditor inspected the documents and sources of information used in the follow-up and determined that the transaction was properly corrected in the system. The auditor also scanned other Daily Unapplied Cash Exception Reports to determine that the control was performed throughout the period of intended reliance.

Because the tests of controls were performed at an interim date, the auditor had to determine whether there were any significant changes in the controls from interim to year-end. Therefore, the auditor asked company personnel about the procedures in place at year-end. Such procedures had not changed from the interim period, therefore, the auditor observed that the controls were still in place by scanning Daily Unapplied Cash Exception Reports to determine the control was performed on a timely basis during the period from September to year-end.

Based on the auditor's procedures, the auditor concluded that the employee was clearing exceptions in a timely manner and that the control was operating effectively as of year-end.

#### *Example B-2.—Monthly Manual Reconciliation*

The auditor determined that accounts receivable is a significant account to the audit of XYZ Company's internal control over financial reporting. Through discussions with company personnel and review of company documentation, the auditor learned that company personnel reconcile the accounts receivable subsidiary ledger to the general ledger on a monthly basis. To determine whether misstatements in accounts receivable (existence, valuation, and completeness) would be detected on a timely basis, the auditor decided to test the control provided by the monthly reconciliation process. *Nature, Timing, and Extent of Procedures.* The auditor tested the company's reconciliation control by selecting a sample of reconciliations based upon the number of accounts, the dollar value of the accounts, and the volume of transactions affecting the account. Because the auditor considered all other receivable accounts immaterial, and because such accounts had only minimal transactions flowing through them, the auditor decided to test only the reconciliation for the trade accounts receivable account. The auditor elected to perform the tests of controls over the reconciliation process in conjunction with the auditor's substantive procedures over the accounts receivable confirmation procedures, which were performed in July.

To test the reconciliation process, the auditor:

a. Made inquiries of personnel performing the control. The auditor asked the employee

performing the reconciliation a number of questions, including the following:

- What documentation describes the account reconciliation process?
- How long have you been performing the reconciliation work?
- What is the reconciliation process for resolving reconciling items?
- How often are the reconciliations formally reviewed and signed off?
- If significant issues or reconciliation problems are noticed, to whose attention do you bring them?
- On average, how many reconciling items are there?
- How are old reconciling items treated?
- If need be, how is the system corrected for reconciling items?
- What is the general nature of these reconciling items?

b. Observed the employee performing the control. The auditor observed the employee performing the reconciliation procedures. For nonrecurring reconciling items, the auditor observed whether each item included a clear explanation as to its nature, the action that had been taken to resolve it, and whether it had been resolved on a timely basis.

c. Reperformed the control. Finally, the auditor inspected the reconciliations and reperformed the reconciliation procedures. For the May and July reconciliations, the auditor traced the reconciling amounts to the source documents on a test basis. The only reconciling item that appeared on these reconciliations was cash received in the lockbox the previous day that had not been applied yet to the customer's account. The auditor pursued the items in each month's reconciliation to determine that the reconciling item cleared the following business day. The auditor also scanned through the file of all reconciliations prepared during the year and noted that they had been performed on a timely basis. To determine that the company had not made significant changes in its reconciliation control procedures from interim to year-end, the auditor made inquiries of company personnel and determined that such procedures had not changed from interim to year-end. Therefore, the auditor verified that controls were still in place by scanning the monthly account reconciliations to determine that the control was performed on a timely basis during the interim to year-end period.

Based on the auditor's procedures, the auditor concluded that the reconciliation control was operating effectively as of year-end.

#### *Example B-3.—Daily Manual Preventive Control*

The auditor determined that cash and accounts payable were significant accounts to the audit of the company's internal control over financial reporting. Through discussions with company personnel, the auditor learned that company personnel make a cash disbursement only after they have matched the vendor invoice to the receiver and purchase order. To determine whether misstatements in cash (existence) and accounts payable (existence, valuation, and completeness) would be prevented on a timely basis, the auditor tested the control

over making a cash disbursement only after matching the invoice with the receiver and purchase.

#### *Nature, Timing, and Extent of Procedures.*

On a haphazard basis, the auditor selected 25 disbursements from the cash disbursement registers from January through September. In this example, the auditor deemed a test of 25 cash disbursement transactions an appropriate sample size because the auditor was testing a manual control performed as part of the routine processing of cash disbursement transactions through the system. Furthermore, the auditor expected no errors based on the results of company-level tests performed earlier. [If, however, the auditor had encountered a control exception, the auditor would have attempted to identify the root cause of the exception and tested an additional number of items. If another control exception had been noted, the auditor would have decided that this control was not effective. As a result, the auditor would have decided to increase the extent of substantive procedures to be performed in connection with the financial statement audit of the cash and accounts payable accounts.]

a. After obtaining the related voucher package, the auditor examined the invoice to see if it included the signature or initials of the accounts payable clerk, evidencing the clerk's performance of the matching control. However, a signature on a voucher package to indicate signor approval does not necessarily mean that the person carefully reviewed it before signing. The voucher package may have been signed based on only a cursory review, or without any review.

b. The auditor decided that the quality of the evidence regarding the effective operation of the control evidenced by a signature or initials was not sufficiently persuasive to ensure that the control operated effectively during the test period. In order to obtain additional evidence, the auditor reperformed the matching control corresponding to the signature, which included examining the invoice to determine that (a) its items matched to the receiver and purchase order and (b) it was mathematically accurate.

Because the auditor performed the tests of controls at an interim date, the auditor updated the testing through the end of the year (initial tests are through September to December) by asking the accounts payable clerk whether the control was still in place and operating effectively. The auditor confirmed that understanding by performing a walkthrough of one transaction in December.

Based on the auditor's procedures, the auditor concluded that the control over making a cash disbursement only after matching the invoice with the receiver and purchase was operating effectively as of year-end.

#### *Example B-4.—Programmed Prevent Control and Weekly Information Technology-Dependent Manual Detective Control*

The auditor determined that cash, accounts payable, and inventory were significant accounts to the audit of the company's internal control over financial reporting. Through discussions with company personnel, the auditor learned that the

company's computer system performs a three-way match of the receiver, purchase order, and invoice. If there are any exceptions, the system produces a list of unmatched items that employees review and follow up on weekly.

In this case, the computer match is a programmed application control, and the review and follow-up of the unmatched items report is a detective control. To determine whether misstatements in cash (existence) and accounts payable/inventory (existence, valuation, and completeness) would be prevented or detected on a timely basis, the auditor decided to test the programmed application control of matching the receiver, purchase order, and invoice as well as the review and follow-up control over unmatched items.

*Nature, Timing, and Extent of Procedures.* To test the programmed application control, the auditor:

a. Identified, through discussion with company personnel, the software used to process receipts and purchase invoices. The software used was a third-party package consisting of a number of modules.

b. Determined, through further discussion with company personnel, that they do not modify the core functionality of the software, but sometimes make personalized changes to reports to meet the changing needs of the business. From previous experience with the company's information technology environment, the auditor believes that such changes are infrequent and that information technology process controls are well established.

c. Established, through further discussion, that the inventory module operated the receiving functionality, including the matching of receipts to open purchase orders. Purchase invoices were processed in the accounts payable module, which matched them to an approved purchase order against which a valid receipt has been made. That module also produced the Unmatched Items Report, a standard report supplied with the package to which the company has not made any modifications. That information was agreed to the supplier's documentation and to documentation within the information technology department.

d. Identified, through discussions with the client and review of the supplier's documentation, the names, file sizes (in bytes), and locations of the executable files (programs) that operate the functionality under review. The auditor then identified the compilation dates of the programs and agreed them to the original installation date of the application. The compilation date of the report code was agreed to documentation held within the information technology department relating to the last change made to that report (a change in formatting).

e. Identified the objectives of the programs to be tested. The auditor wanted to determine whether appropriate items are received (for example, match a valid purchase order), appropriate purchase invoices are posted (for example, match a valid receipt and purchase order, non-duplicate reference numbers) and unmatched items (for example, receipts, orders or invoices) are listed on the exception report. The auditor then reperformed all

those variations in the packages on a test-of-one basis to determine that the programs operated as described.

In addition, the auditor had evaluated and tested general computer controls, including program changes (for example, confirmation that no unauthorized changes are undertaken to the functionality and that changes to reports are appropriately authorized, tested, and approved before being applied) and logical access (for example, user access to the inventory and accounts payable modules and access to the area on the system where report code is maintained), and concluded that they were operating effectively. (Since the computer is deemed to operate in a systematic manner, the auditor concluded that it was sufficient to perform a walkthrough for only the one item.)

To determine whether the programmed control was operating effectively, the auditor performed a walkthrough in the month of July. As a result of the walkthrough, the auditor performed and documented the following items:

a. Receiving cannot record the receipt of goods without matching the receipt to a purchase order on the system. The auditor tested that control by attempting to record the receipt of goods into the system without a purchase order. However, the system did not allow the auditor to do that. Rather, the system produced an error message stating that the goods could not be recorded as received without an active purchase order.

b. An invoice will not be paid unless the system can match the receipt and vendor invoice to an approved purchase order. The auditor tested that control by attempting to approve an invoice for payment in the system. The system did not allow the auditor to do that. Rather, it produced an error message indicating that invoices could not be paid without an active purchase order and receiver.

c. The system disallows the processing of invoices with identical vendor and identical invoice numbers. In addition, the system will not allow two invoices to be processed against the same purchase order unless the sum of the invoices is less than the amount approved on the purchase order. The auditor tested that control by attempting to process duplicate invoices. However, the system produced an error message indicating that the invoice had already been processed.

d. The system compares the invoice amounts to the purchase order. If there are differences in quantity/extended price, and such differences fall outside a pre-approved tolerance, the system does not allow the invoice to be processed. The auditor tested that control by attempting to process an invoice that had quantity/price differences outside the tolerance level of 10 pieces, or \$1,000. The system produced an error message indicating that the invoice could not be processed because of such differences.

e. The system processes payments only for vendors established in the vendor master file. The auditor tested that control by attempting to process an invoice for a vendor that was not established in the vendor master file. However, the system did not allow the payment to be processed.

f. The auditor tested user access to the vendor file and whether such users can make

modifications to such file by attempting to access and make changes to the vendor tables. However, the system did not allow the auditor to perform that function and produced an error message stating that the user was not authorized to perform that function.

g. The auditor verified the completeness and accuracy of the Unmatched Items Report by verifying that one unmatched item was on the report and one matched item was not on the report.

**Note:** It is inadvisable for the auditor to have uncontrolled access to the company's systems in his or her attempts described above to record the receipt of goods without a purchase order, approve an invoice for payment, process duplicate invoices, etc. These procedures ordinarily are performed in the presence of appropriate company personnel so that they can be notified immediately of any breach to their systems.

To test the detect control of review and follow up on the Unmatched Items Report, the auditor performed the following procedures in the month of July for the period January to July:

a. Made inquiries of company personnel. To gain an understanding of the procedures in place to ensure that all unmatched items are followed-up properly and that corrections are made on a timely basis, the auditor made inquiries of the employee who follows up on the weekly-unmatched items reports. On a weekly basis, the control required the employee to review the Unmatched Items Report to determine why items appear on it. The employee's review includes proper follow-up on items, including determining whether:

- All open purchase orders are either closed or voided within an acceptable amount of time.
- The requesting party is notified periodically of the status of the purchase order and the reason for its current status.
- The reason the purchase order remains open is due to incomplete shipment of goods and, if so, whether the vendor has been notified.
- There are quantity problems that should be discussed with purchasing.

b. Observed the performance of the control. The auditor observed the employee performing the control for the Unmatched Items Reports generated during the first week in July.

c. Reperformed the control. The auditor selected five weekly Unmatched Items Reports, selected several items from each, and reperformed the procedures that the employee performed. The auditor also scanned other Unmatched Items Reports to determine that the control was performed throughout the period of intended reliance.

To determine that the company had not made significant changes in their controls from interim to year-end, the auditor discussed with company personnel the procedures in place for making such changes. Since the procedures had not changed from interim to year-end, the auditor observed that the controls were still in place by scanning the weekly Unmatched Items Reports to determine that the control was performed on a timely basis during the interim to year-end period.

Based on the auditor's procedures, the auditor concluded that the employee was clearing exceptions in a timely manner and that the control was operating effectively as of year-end.

### Appendix C—Safeguarding of Assets

C1. *Safeguarding of assets* is defined in paragraph 7 as those policies and procedures that "provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of the company's assets that could have a material effect on the financial statements." This definition is consistent with the definition provided in the Committee of Sponsoring Organizations (COSO) of the Treadway Commission's Addendum, *Reporting to External Parties*, which provides the following definition of internal control over safeguarding of assets:

Internal control over safeguarding of assets against unauthorized acquisition, use or disposition is a process, effected by an entity's board of directors, management and other personnel, designed to provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use, or disposition of the entity's assets that could have a material effect on the financial statements. Such internal control can be judged effective if the board of directors and management have reasonable assurance that unauthorized acquisition, use or disposition of the entity's assets that could have a material effect on the financial statements is being prevented or detected on a timely basis.

C2. For example, a company has safeguarding controls over inventory tags (preventive controls) and also performs periodic physical inventory counts (detective control) timely in relation to its quarterly and annual financial reporting dates. Although the physical inventory count does not safeguard the inventory from theft or loss, it prevents a material misstatement to the financial statements if performed effectively and timely.

C3. Therefore, given that the definitions of material weakness and significant deficiency relate to the likelihood of misstatement of the financial statements, the failure of a preventive control such as inventory tags will not result in a significant deficiency or material weakness if the detective control (physical inventory) prevents a misstatement of the financial statements. The COSO Addendum also indicates that to the extent that such losses might occur, controls over financial reporting are effective if they provide reasonable assurance that those losses are properly reflected in the financial statements, thereby alerting financial statement users to consider the need for action.

Note: *Properly reflected* in the financial statements includes both correctly recording the loss and adequately disclosing the loss.

C4. Material weaknesses relating to controls over the safeguarding of assets would only exist when the company does not have effective controls (considering both safeguarding and other controls) to prevent or detect a material misstatement of the financial statements.

C5. Furthermore, management's plans that could potentially affect financial reporting in future periods are not controls. For example, a company's business continuity or contingency planning has no effect on the company's current abilities to initiate, authorize, record, process, or report financial data. Therefore, a company's business continuity or contingency planning is not part of internal control over financial reporting.

C6. The COSO Addendum provides further information about safeguarding of assets as it relates to internal control over financial reporting.

### Appendix D—Examples of Significant Deficiencies and Material Weaknesses

D1. Paragraph 8 of this standard defines a control deficiency. Paragraphs 9 and 10 go on to define a significant deficiency and a material weakness, respectively.

D2. Paragraphs 22 through 23 of this standard discuss materiality in an audit of internal control over financial reporting, and paragraphs 130 through 140 provide additional direction on evaluating deficiencies in internal control over financial reporting.

D3. The following examples illustrate how to evaluate the significance of internal control deficiencies in various situations. These examples are for illustrative purposes only.

#### Example D-1.—Reconciliations of Intercompany Accounts Are Not Performed on a Timely Basis

##### Scenario A—Significant Deficiency

The company processes a significant number of routine intercompany transactions on a monthly basis. Individual intercompany transactions are not material and primarily relate to balance sheet activity, for example, cash transfers between business units to finance normal operations.

A formal management policy requires monthly reconciliation of intercompany accounts and confirmation of balances between business units. However, there is not a process in place to ensure performance of these procedures. As a result, detailed reconciliations of intercompany accounts are not performed on a timely basis. Management does perform monthly procedures to investigate selected large-dollar intercompany account differences. In addition, management prepares a detailed monthly variance analysis of operating expenses to assess their reasonableness.

Based only on these facts, the auditor should determine that this deficiency represents a significant deficiency for the following reasons: The magnitude of a financial statement misstatement resulting from this deficiency would reasonably be expected to be more than inconsequential, but less than material, because individual intercompany transactions are not material, and the compensating controls operating monthly should detect a material misstatement. Furthermore, the transactions are primarily restricted to balance sheet accounts. However, the compensating detective controls are designed only to detect

material misstatements. The controls do not address the detection of misstatements that are more than inconsequential but less than material. Therefore, the likelihood that a misstatement that was more than inconsequential, but less than material, could occur is more than remote.

##### Scenario B—Material Weakness

The company processes a significant number of intercompany transactions on a monthly basis. Intercompany transactions relate to a wide range of activities, including transfers of inventory with intercompany profit between business units, allocation of research and development costs to business units and corporate charges. Individual intercompany transactions are frequently material.

A formal management policy requires monthly reconciliation of intercompany accounts and confirmation of balances between business units. However, there is not a process in place to ensure that these procedures are performed on a consistent basis. As a result, reconciliations of intercompany accounts are not performed on a timely basis, and differences in intercompany accounts are frequent and significant. Management does not perform any alternative controls to investigate significant intercompany account differences.

Based only on these facts, the auditor should determine that this deficiency represents a material weakness for the following reasons: The magnitude of a financial statement misstatement resulting from this deficiency would reasonably be expected to be material, because individual intercompany transactions are frequently material and relate to a wide range of activities. Additionally, actual unreconciled differences in intercompany accounts have been, and are, material. The likelihood of such a misstatement is more than remote because such misstatements have frequently occurred and compensating controls are not effective, either because they are not properly designed or not operating effectively. Taken together, the magnitude and likelihood of misstatement of the financial statements resulting from this internal control deficiency meet the definition of a material weakness.

#### Example D-2.—Modifications to Standard Sales Contract Terms Not Reviewed To Evaluate Impact on Timing and Amount of Revenue Recognition

##### Scenario A—Significant Deficiency

The company uses a standard sales contract for most transactions. Individual sales transactions are not material to the entity. Sales personnel are allowed to modify sales contract terms. The company's accounting function reviews significant or unusual modifications to the sales contract terms, but does not review changes in the standard shipping terms. The changes in the standard shipping terms could require a delay in the timing of revenue recognition. Management reviews gross margins on a monthly basis and investigates any significant or unusual relationships. In addition, management reviews the reasonableness of inventory levels at the end of each accounting period. The entity has

experienced limited situations in which revenue has been inappropriately recorded in advance of shipment, but amounts have not been material.

Based only on these facts, the auditor should determine that this deficiency represents a significant deficiency for the following reasons: The magnitude of a financial statement misstatement resulting from this deficiency would reasonably be expected to be more than inconsequential, but less than material, because individual sales transactions are not material and the compensating detective controls operating monthly and at the end of each financial reporting period should reduce the likelihood of a material misstatement going undetected. Furthermore, the risk of material misstatement is limited to revenue recognition errors related to shipping terms as opposed to broader sources of error in revenue recognition. However, the compensating detective controls are only designed to detect material misstatements. The controls do not effectively address the detection of misstatements that are more than inconsequential but less than material, as evidenced by situations in which transactions that were not material were improperly recorded. Therefore, there is a more than remote likelihood that a misstatement that is more than inconsequential but less than material could occur.

#### *Scenario B—Material Weakness*

The company has a standard sales contract, but sales personnel frequently modify the terms of the contract. The nature of the modifications can affect the timing and amount of revenue recognized. Individual sales transactions are frequently material to the entity, and the gross margin can vary significantly for each transaction.

The company does not have procedures in place for the accounting function to regularly review modifications to sales contract terms. Although management reviews gross margins on a monthly basis, the significant differences in gross margins on individual transactions make it difficult for management to identify potential misstatements. Improper revenue recognition has occurred, and the amounts have been material. Based only on these facts, the auditor should determine that this deficiency represents a material weakness for the following reasons: The magnitude of a financial statement misstatement resulting from this deficiency would reasonably be expected to be material, because individual sales transactions are frequently material, and gross margin can vary significantly with each transaction

(which would make compensating detective controls based on a reasonableness review ineffective). Additionally, improper revenue recognition has occurred, and the amounts have been material. Therefore, the likelihood of material misstatements occurring is more than remote. Taken together, the magnitude and likelihood of misstatement of the financial statements resulting from this internal control deficiency meet the definition of a material weakness.

#### *Scenario C—Material Weakness*

The company has a standard sales contract, but sales personnel frequently modify the terms of the contract. Sales personnel frequently grant unauthorized and unrecorded sales discounts to customers without the knowledge of the accounting department. These amounts are deducted by customers in paying their invoices and are recorded as outstanding balances on the accounts receivable aging. Although these amounts are individually insignificant, they are material in the aggregate and have occurred consistently over the past few years.

Based on only these facts, the auditor should determine that this deficiency represents a material weakness for the following reasons: The magnitude of a financial statement misstatement resulting from this deficiency would reasonably be expected to be material, because the frequency of occurrence allows insignificant amounts to become material in the aggregate. The likelihood of material misstatement of the financial statements resulting from this internal control deficiency is more than remote (even assuming that the amounts were fully reserved for in the company's allowance for uncollectible accounts) due to the likelihood of material misstatement of the gross accounts receivable balance. Therefore, this internal control deficiency meets the definition of a material weakness.

#### **Example D-3.—Identification of Several Deficiencies**

##### *Scenario A—Material Weakness*

During its assessment of internal control over financial reporting, management identified the following deficiencies. Based on the context in which the deficiencies occur, management and the auditor agree that these deficiencies individually represent significant deficiencies:

- Inadequate segregation of duties over certain information system access controls.
- Several instances of transactions that were not properly recorded in subsidiary ledgers; transactions were not material, either individually or in the aggregate.

- A lack of timely reconciliations of the account balances affected by the improperly recorded transactions.

Based only on these facts, the auditor should determine that the combination of these significant deficiencies represents a material weakness for the following reasons: Individually, these deficiencies were evaluated as representing a more than remote likelihood that a misstatement that is more than inconsequential, but less than material, could occur. However, each of these significant deficiencies affects the same set of accounts. Taken together, these significant deficiencies represent a more than remote likelihood that a material misstatement could occur and not be prevented or detected. Therefore, in combination, these significant deficiencies represent a material weakness.

##### *Scenario B—Material Weakness*

During its assessment of internal control over financial reporting, management of a financial institution identifies deficiencies in: the design of controls over the estimation of credit losses (a critical accounting estimate); the operating effectiveness of controls for initiating, processing, and reviewing adjustments to the allowance for credit losses; and the operating effectiveness of controls designed to prevent and detect the improper recognition of interest income. Management and the auditor agree that, in their overall context, each of these deficiencies individually represent a significant deficiency.

In addition, during the past year, the company experienced a significant level of growth in the loan balances that were subjected to the controls governing credit loss estimation and revenue recognition, and further growth is expected in the upcoming year. Based only on these facts, the auditor should determine that the combination of these significant deficiencies represents a material weakness for the following reasons:

- The balances of the loan accounts affected by these significant deficiencies have increased over the past year and are expected to increase in the future.
- This growth in loan balances, coupled with the combined effect of the significant deficiencies described, results in a more than remote likelihood that a material misstatement of the allowance for credit losses or interest income could occur.

Therefore, in combination, these deficiencies meet the definition of a material weakness.

#### **Appendix E—Background and Basis for Conclusions**

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## Introduction

E1. This appendix summarizes factors that the Public Company Accounting Oversight Board (the “Board”) deemed significant in reaching the conclusions in the standard. This appendix includes reasons for accepting certain views and rejecting others.

## Background

E2. Section 404(a) of the Sarbanes-Oxley Act of 2002 (the “Act”), and the Securities and Exchange Commission’s (SEC) related implementing rules, require the management of a public company to assess the effectiveness of the company’s internal control over financial reporting, as of the end of the company’s most recent fiscal year. Section 404(a) of the Act also requires management to include in the company’s annual report to shareholders management’s conclusion as a result of that assessment of whether the company’s internal control over financial reporting is effective.

E3. Sections 103(a)(2)(A) and 404(b) of the Act direct the Board to establish professional standards governing the independent auditor’s attestation and reporting on management’s assessment of the effectiveness of internal control over financial reporting.

E4. The backdrop for the development of the Board’s first major auditing standard was, of course, the spectacular audit failures and corporate malfeasance that led to the passage of the Act. Although all of the various components of the Act work together to help restore investor confidence and help prevent the types of financial reporting breakdowns that lead to the loss of investor confidence, section 404 of the Act is certainly one of the most visible and tangible changes required by the Act.

E5. The Board believes that effective controls provide the foundation for reliable financial reporting. Congress believed this too, which is why the new reporting by management and the auditor on the effectiveness of internal control over financial reporting received such prominent attention in the Act. Internal control over financial reporting enhances a company’s ability to produce fair and complete financial reports. Without reliable financial reports, making good judgments and decisions about a company becomes very difficult for anyone, including the board of directors, management, employees, investors, lenders, customers, and regulators. The auditor’s reporting on management’s assessment of the effectiveness of internal control over financial reporting provides users of that report with important assurance about the reliability of the company’s financial reporting.

E6. The Board’s efforts to develop this standard were an outward expression of the Board’s mission, “to protect the interests of investors and further the public interest in the preparation of informative, fair, and

independent audit reports.” As part of fulfilling that mission as it relates to this standard, the Board considered the advice that respected groups had offered to other auditing standards setters in the past. For example, the Public Oversight Board’s Panel on Audit Effectiveness recommended that “auditing standards need to provide clear, concise and definitive imperatives for auditors to follow.”<sup>39</sup> As another example, the International Organization of Securities Commissioners advised the International Auditing and Assurance Standards Board “that the IAASB must take care to avoid language that could inadvertently encourage inappropriate shortcuts in audits, at a time when rigorous audits are needed more than ever to restore investor confidence.”<sup>40</sup>

E7. The Board understood that, to effectively fulfill its mission and for this standard to achieve its ultimate goal of restoring investor confidence by increasing the reliability of public company financial reporting, the Board’s standard must contain clear directions to the auditor consistent with investor’s expectations that the reliability of financial reporting be significantly improved. Just as important, the Board recognized that this standard must appropriately balance the costs to implement the standard’s directions with the benefits of achieving these important goals. As a result, all of the Board’s decisions about this standard were guided by the additional objective of creating a rational relationship between costs and benefits.

E8. When the Board adopted its interim attestation standards in Rule 3300T on an initial, transitional basis, the Board adopted a pre-existing standard governing an auditor’s attestation on internal control over financial reporting.<sup>41</sup> As part of the Board’s process of evaluating that pre-existing standard, the Board convened a public roundtable discussion on July 29, 2003 to discuss issues and hear views related to reporting on internal control over financial reporting. The participants at the roundtable

included representatives from public companies, accounting firms, investor groups, and regulatory organizations. Based on comments made at the roundtable, advice from the Board’s staff, and other input the Board received, the Board determined that the pre-existing standard governing an auditor’s attestation on internal control over financial reporting was insufficient for effectively implementing the requirements of Section 404 of the Act and for the Board to appropriately discharge its standard-setting obligations under Section 103(a) of the Act. In response, the Board developed and issued, on October 7, 2003, a proposed auditing standard titled, *An Audit of Internal Control Over Financial Reporting Performed in Conjunction with An Audit of Financial Statements*.

E9. The Board received 189 comment letters on a broad array of topics from a variety of commenters, including auditors, investors, internal auditors, issuers, regulators, and others. Those comments led to changes in the standard, intended to make the requirements of the standard clearer and more operational. This appendix summarizes significant views expressed in those comment letters and the Board’s responses.

## Fundamental Scope of the Auditor’s Work in an Audit of Internal Control Over Financial Reporting

E10. The proposed standard stated that the auditor’s objective in an audit of internal control over financial reporting was to express an opinion on management’s assessment of the effectiveness of the company’s internal control over financial reporting. To render such an opinion, the proposed standard required the auditor to obtain reasonable assurance about whether the company maintained, in all material respects, effective internal control over financial reporting as of the date specified in management’s report. To obtain reasonable assurance, the auditor was required to evaluate both management’s process for making its assessment and the effectiveness of internal control over financial reporting.

E11. Virtually all investors and auditors who submitted comment letters expressed support for this approach. Other commenters, primarily issuers, expressed concerns that this approach was contrary to the intent of Congress and, therefore, beyond what was specifically required by Section 404 of the Act. Further, issuers stated their views that this approach would lead to unnecessary and excessive costs. Some commenters in this group suggested the auditor’s work should be limited to evaluating management’s assessment process and the testing performed by management and internal audit. Others acknowledged that the auditor would need to test at least some controls directly in addition to evaluating and testing management’s assessment process. However, these

<sup>39</sup> Panel on Audit Effectiveness, *Report and Recommendations*, sec. 2.228 (August 31, 2000).

<sup>40</sup> April 8, 2003 comment letter from the International Organization of Securities Commissions to the International Auditing and Assurance Standards Board regarding the proposed international standards on audit risk (Amendment to ISA 200, “Objective and Principles Governing an Audit of Financial Statements;” proposed ISAs, “Understanding the Entity and Its Environment and Assessing the Risks of Material Misstatement;” “Auditor’s Procedures in Response to Assessed Risks;” and “Audit Evidence”).

<sup>41</sup> The pre-existing standard is Chapter 5, “Reporting on an Entity’s Internal Control Over Financial Reporting” of Statement on Standards for Attestation Engagements (SSAE) No. 10, *Attestation Standards: Revision and Recodification* (AICPA, Professional Standards, Vol. 1, AT sec. 501). SSAE No. 10 has been codified into AICPA Professional Standards, Volume 1, as AT sections 101 through 701.

commenters described various ways in which the auditor's own testing could be significantly reduced from the scope expressed in the proposed standard. For instance, they proposed that the auditor could be permitted to use the work of management and others to a much greater degree; that the auditor could use a "risk analysis" to identify only a few controls to be tested; and a variety of other methods to curtail the extent of the auditor's work. Of those opposed to the scope, most cited their belief that the scope of work embodied in the standard would lead to a duplication of effort between management and the auditor which would needlessly increase costs without adding significant value.

E12. After considering the comments, the Board retained the approach described in the proposed standard. The Board concluded that the approach taken in the standard is consistent with the intent of Congress. Also, to provide the type of report, at the level of assurance called for in Sections 103 and 404, the Board concluded that the auditor must evaluate both management's assessment process and the effectiveness of internal control over financial reporting. Finally, the Board noted the majority of the cost to be borne by companies (and ultimately investors) results directly from the work the company will have to perform to maintain effective internal control over financial reporting and to comply with Section 404(a) of the Act. The cost of the auditor's work as described in this standard ultimately will represent a smaller portion of the total cost to companies of implementing Section 404.

E13. The Board noted that large, federally insured financial institutions have had a similar internal control reporting requirement for over ten years. The Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA) has required, since 1993, managements of large financial institutions to make an assessment of internal control over financial reporting effectiveness and the institution's independent auditor to issue an attestation report on management's assessment.

E14. The attestation standards under which FDICIA engagements are currently performed are clear that, when performing an examination of management's assertion on the effectiveness of internal control over financial reporting (management's report on the assessment required by Section 404(a) of the Act must include a statement as to whether the company's internal control over financial reporting is effective), the auditor may express an opinion either on management's assertion (that is, whether management's assessment about the effectiveness of the internal control over financial reporting is fairly stated) or directly on the subject matter (that is, whether the internal control over financial reporting is effective) because the level of work that must be performed is the same in either case.

E15. The Board observed that Congress indicated an intent to require an examination level of work in Section 103(a) of the Act, which states, in part, that each registered public accounting firm shall: Describe in each audit report the scope of the auditor's testing of the internal control structure and

procedures of the issuer, required by Section 404(b), and present (in such report or in a separate report)—

(I) the findings of the auditor from such testing;

(II) an evaluation of whether such internal control structure and procedures—

(aa) include maintenance of records that in reasonable detail accurately reflect the transactions and dispositions of the assets of the issuer;

(bb) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the issuer are being made only in accordance with authorizations of management and directors of the issuer; and

(III) a description, at a minimum, of material weaknesses in such internal controls, and of any material noncompliance found on the basis of such testing. [emphasis added].

E16. The Board concluded that the auditor must test internal control over financial reporting directly, in the manner and extent described in the standard, to make the evaluation described in Section 103. The Board also interpreted Section 103 to provide further support that the intent of Congress was to require an opinion on the effectiveness of internal control over financial reporting.

E17. The Board concluded that the auditor must obtain a high level of assurance that the conclusion expressed in management's assessment is correct to provide an opinion on management's assessment. An auditing process restricted to evaluating what management has done would not provide the auditor with a sufficiently high level of assurance that management's conclusion is correct. Instead, it is necessary for the auditor to evaluate management's assessment process to be satisfied that management has an appropriate basis for its statement, or assertion, about the effectiveness of the company's internal control over financial reporting. It also is necessary for the auditor to directly test the effectiveness of internal control over financial reporting to be satisfied that management's conclusion is correct, and that management's assertion is fairly stated.

E18. This testing takes on added importance with the public nature of the internal control reporting. Because of the auditor's association with a statement by management that internal control over financial reporting is effective, it is reasonable for a user of the auditor's report to expect that the auditor tested the effectiveness of internal control over financial reporting. For the auditor to do otherwise would create an expectation gap, in which the assurance that the auditor obtained is less than what users reasonably expect.

E19. Auditors, investors, and the Federal bank regulators reaffirmed in their comment letters on the proposed auditing standard that the fundamental approach taken by the Board was appropriate and necessary. Investors were explicit in their expectation that the auditor must test the effectiveness of controls directly in addition to evaluating

management's assessment process. Investors further recognized that this kind of assurance would come at a price and expressed their belief that the cost of the anticipated benefits was reasonable. The federal banking regulators, based on their experience examining financial institutions' internal control assessments and independent auditors' attestation reports under FDICIA, commented that the proposed auditing standard was a significant improvement over the existing attestation standard.

#### Reference To Audit vs. Attestation

E20. The proposed standard referred to the attestation required by Section 404(b) of the Act as the *audit* of internal control over financial reporting instead of an *attestation* of management's assessment. The proposed standard took that approach both because the auditor's objective is to express an opinion on management's assessment of the effectiveness of internal control over financial reporting, just as the auditor's objective in an audit of the financial statements is to express an opinion on the fair presentation of the financial statements, and because the level of assurance obtained by the auditor is the same in both cases. Furthermore, the proposed standard described an *integrated* audit of the financial statements and internal control over financial reporting and allowed the auditor to express his or her opinions on the financial statements and on the effectiveness of internal control in separate reports or in a single, combined report.

E21. Commenters' views on this matter frequently were related to their views on whether the proposed scope of the *audit* was appropriate. Those who agreed that the scope in the proposed standard was appropriate generally agreed that referring to the engagement as an *audit* was appropriate. On the other hand, commenters who objected to the scope of work described in the proposed standard often drew an important distinction between an *audit* and an *attestation*. Because Section 404 calls for an *attestation*, they believed it was inappropriate to call the engagement anything else (or to mandate a scope that called for a more extensive level of work).

E22. Based, in part, on the Board's decisions about the scope of the audit of internal control over financial reporting, the Board concluded that the engagement should continue to be referred to as an "audit." This term emphasizes the nature of the auditor's objective and communicates that objective most clearly to report users. Use of this term also is consistent with the integrated approach described in the standard and the requirement in Section 404 of the Act that this reporting not be subject to a separate engagement.

E23. Because the Board's standard on internal control is an auditing standard, it is preferable to use the term *audit* to describe the engagement rather than the term *examination*, which is used in the attestation standards to describe an engagement designed to provide a high level of assurance.

E24. Finally, the Board believes that using the term *audit* helps dispel the misconception that an audit of internal

control over financial reporting is a different level of service than an attestation of management's assessment of internal control over financial reporting.

#### Form of the Auditor's Opinion

E25. The proposed auditing standard required that the auditor's opinion in his or her report state whether management's assessment of the effectiveness of the company's internal control over financial reporting as of the specified date is fairly stated, in all material respects, based on the control criteria. However, the proposed standard also stated that nothing precluded the auditor from auditing management's assessment and opining directly on the effectiveness of internal control over financial reporting. This is because the scope of the work, as defined by the proposed standard, was the same, regardless of whether the auditor reports on management's assessment or directly on the effectiveness of internal control over financial reporting. The form of the opinion was essentially interchangeable between the two.

E26. However, if the auditor planned to issue other than an unqualified opinion, the proposed standard required the auditor to report directly on the effectiveness of the company's internal control over financial reporting rather than on management's assessment. The Board initially concluded that expressing an opinion on management's assessment, in these circumstances, did not most effectively communicate the auditor's conclusion that internal control was not effective. For example, if management expresses an adverse assessment because a material weakness exists at the date of management's assessment (" \* \* \* internal control over financial reporting is not effective \* \* \*") and the auditor expresses his or her opinion on management's assessment (" \* \* \* management's assessment that internal control over financial reporting is not effective is fairly stated, in all material respects \* \* \*"), a reader might not be clear about the results of the auditor's testing and about the auditor's conclusions. The Board initially decided that reporting directly on the effectiveness of the company's internal control over financial reporting better communicates to report users the effect of such conditions, because direct reporting more clearly states the auditor's conclusions about the effectiveness of internal control over financial reporting ("In our opinion, because of the effect of the material weakness described \* \* \*, the Company's internal control over financial reporting is not effective.").

E27. A number of commenters were supportive of the model described in the previous paragraph, as they agreed with the Board's reasoning. However, several commenters believed that report users would be confused as to why the form of the auditor's opinion would be different in various circumstances. These commenters thought that the auditor's opinion should be consistently expressed in all reports. Several auditors recommended that auditors always report directly on the effectiveness of the company's internal control over financial reporting. They reasoned that the scope of

the audit—which always would require the auditor to obtain reasonable assurance about whether the internal control over financial reporting was effective—would be more clearly communicated, in all cases, by the auditor reporting directly on the effectiveness of internal control over financial reporting. Other commenters suggested that the auditor always should express two opinions: one on management's assessment and one directly on the effectiveness of internal control over financial reporting. They believed the Act called for two opinions: Section 404 calls for an opinion on management's assessment, while Section 103 calls for an opinion directly on the effectiveness of internal control over financial reporting.

E28. The Board believes that the reporting model in the proposed standard is appropriate. However, the Board concluded that the expression of two opinions—one on management's assessment and one on the effectiveness of internal control over financial reporting—in all reports is a superior approach that balances the concerns of many different interested parties. This approach is consistent with the scope of the audit, results in more consistent reporting in differing circumstances, and makes the reports more easily understood by report users. Therefore, the standard requires that the auditor express two opinions in all reports on internal control over financial reporting.

#### Use of the Work of Others

E29. After giving serious consideration to a rational relationship between costs and benefits, the Board decided to change the provisions in the proposed standard regarding using the work of others. The proposed standard required the auditor to evaluate whether to use the work of others, such as internal auditors and others working under the direction of management, and described an evaluation process focused on the competence and objectivity of the persons who performed the work that the auditor was required to use when determining the extent to which he or she could use the work of others.

E30. The proposed standard also described two principles that limited the auditor's ability to use the work of others. First, the proposed standard defined three categories of controls and the extent to which the auditor could use the work of others in each of those categories:

- Controls for which the auditor should not rely on the work of others, such as controls in the control environment and controls specifically intended to prevent or detect fraud that is reasonably likely to have a material effect on the company's financial statements,
- Controls for which the auditor may rely on the work of others, but his or her reliance on the work of others should be limited, such as controls over nonroutine transactions that are considered high risk because they involve judgments and estimates, and
- Controls for which the auditor's reliance on the work of others is not specifically limited, such as controls over routine processing of significant accounts.

E31. Second, the proposed standard required that, on an overall basis, the

auditor's own work must provide the principal evidence for the audit opinion (this is referred to as the *principal evidence provision*).

E32. In the proposed standard, these two principles provided the auditor with flexibility in using the work of others while preventing him or her from placing inappropriate over-reliance on the work of others. Although the proposed standard required the auditor to reperform some of the tests performed by others to use their work, it did not establish specific requirements for the extent of the reperformance. Rather, it allowed the auditor to use his or her judgment and the directions provided by the two principles discussed in the previous two paragraphs to determine the appropriate extent of reperformance.

E33. The Board received a number of comments that agreed with the proposed three categories of controls and the principal evidence provision. However, most commenters expressed some level of concern with the categories, the principal evidence provision, or both.

E34. Comments opposing or criticizing the categories of controls varied from general to very specific. In general terms, many commenters (particularly issuers) expressed concern that the categories described in the proposed standard were too restrictive. They believed the auditor should be able to use his or her judgment to determine in which areas and to what extent to rely on the work of others. Other commenters indicated that the proposed standard did not place enough emphasis on the work of internal auditors whose competence and objectivity, as well as adherence to professional standards of internal auditing, should clearly set their work apart from the work performed by others in the organization (such as management or third parties working under management's direction). Further, these commenters believed that the standard should clarify that the auditor should be able to use work performed by internal auditors extensively. In that case, their concerns about excessive cost also would be partially alleviated.

E35. Other commenters expressed their belief that the proposed standard repudiated the approach established in AU sec. 322, *The Auditor's Consideration of the Internal Audit Function in an Audit of Financial Statements*, for the auditor's use of the work of internal auditors in a financial statement audit. Commenters also expressed very specific and pointed views on the three categories of controls. As defined in the proposed standard, the first category (in which the auditor should not use the work of others at all) included:

- Controls that are part of the control environment, including controls specifically established to prevent and detect fraud that is reasonably likely to result in material misstatement of the financial statements.
- Controls over the period-end financial reporting process, including controls over procedures used to enter transaction totals into the general ledger; to initiate, record, and process journal entries in the general ledger; and to record recurring and nonrecurring adjustments to the financial

statements (for example, consolidating adjustments, report combinations, and reclassifications).

- Controls that have a pervasive effect on the financial statements, such as certain information technology general controls on which the operating effectiveness of other controls depend.

- Walkthroughs.

E36. Commenters expressed concern that the prohibition on using the work of others in these areas would (a) drive unnecessary and excessive costs, (b) not give appropriate recognition to those instances in which the auditor evaluated internal audit as having a high degree of competence and objectivity, and (c) be impractical due to resource constraints at audit firms. Although each individual area was mentioned, the strongest and most frequent objections were to the restrictions imposed over the inclusion in the first category of walkthroughs, controls over the period-end financial reporting process, and information technology general controls. Some commenters suggested the Board should consider moving these areas from the first category to the second category (in which using the work of others would be limited, rather than prohibited); others suggested removing any limitation on using the work of others in these areas altogether.

E37. Commenters also expressed other concerns with respect to the three control categories. Several commenters asked for clarification on what constituted *limited* use of the work of others for areas included in the second category. Some commenters asked for clarification about the extent of reperformance necessary for the auditor to use the work of others. Other commenters questioned the meaning of the term *without specific limitation* in the third category by asking, did this mean that the auditor could use the work of others in these areas without performing or reperforming *any* work in those areas?

E38. Although most commenters suggested that the principal evidence threshold for the auditor's own work be retained, some commenters objected to the principal evidence provision. Although many commenters identified the broad array of areas identified in the first category (in which the auditor should not use the work of others at all) as the key driver of excessive costs, others identified the principal evidence provision as the real source of their excessive cost concerns. Even if the categories were redefined in such a way as to permit the auditor to use the work of others in more areas, any associated decrease in audit cost would be limited by the principal evidence provision which, if retained, would still require significant original work on the part of the auditor. On the other hand, both investors and auditors generally supported retaining the principal evidence provision as playing an important role in ensuring the independence of the auditor's opinion and preventing inappropriate overreliance on the work of internal auditors and others.

E39. Commenters who both supported and opposed the principal evidence provision indicated that implementing it would be problematic because the nature of the work in an audit of internal control over financial

reporting does not lend itself to a purely quantitative measurement. Thus, auditors would be forced to use judgment when determining whether the principal evidence provision has been satisfied.

E40. In response to the comments, the Board decided that some changes to the guidance on using the work of others were necessary. The Board did not intend to reject the concepts in AU sec. 322 and replace them with a different model. Although AU sec. 322 is designed to apply to an audit of financial statements, the Board concluded that the concepts contained in AU sec. 322 are sound and should be used in an audit of internal control over financial reporting, with appropriate modification to take into account the differences in the nature of the evidence necessary to support an opinion on financial statements and the evidence necessary to support an opinion on internal control effectiveness. The Board also wanted to make clear that the concepts in AU sec. 322 also may be applied, with appropriate auditor judgment, to the relevant work of others.

E41. The Board remained concerned, however, with the possibility that auditors might overrely on the work of internal auditors and others. Inappropriate overreliance can occur in a variety of ways. For example, an auditor might rely on the work of a highly competent and objective internal audit function for proportionately too much of the evidence that provided the basis for the auditor's opinion. Inappropriate overreliance also occurs when the auditor incorrectly concludes that internal auditors have a high degree of competence and objectivity when they do not, perhaps because the auditor did not exercise professional skepticism or due professional care when making his or her evaluation. In either case, the result is the same: unacceptable risk that the auditor's conclusion that internal control over financial reporting is effective is incorrect. For example, federal bank regulators commented that, in their experience with FDICIA, auditors have a tendency to rely too heavily on the work of management and others, further noting that this situation diminishes the independence of the auditor's opinion on control effectiveness.

E42. The Board decided to revise the categories of controls by focusing on the nature of the controls being tested, evaluating the competence and objectivity of the individuals performing the work, and testing the work of others. This allows the auditor to exercise substantial judgment based on the outcome of this work as to the extent to which he or she can make use of the work of internal auditors or others who are suitably qualified.

E43. This standard emphasizes the direct relationship between the assessed level of competence and objectivity and the extent to which the auditor may use the work of others. The Board included this clarification to highlight the special status that a highly competent and objective internal auditor has in the auditor's work as well as to caution against inappropriate overreliance on the work of management and others who would be expected to have lower degrees of competence and objectivity in assessing

controls. Indeed, the Board noted that, with regard to internal control over financial reporting, internal auditors would normally be assessed as having a higher degree of competence and objectivity than management or others and that an auditor will be able to rely to a greater extent on the work of a highly competent and objective internal auditor than on work performed by others within the company.

E44. The Board concluded that the principal evidence provision is critical to preventing overreliance on the work of others in an audit of internal control over financial reporting. The requirement for the auditor to perform enough of the control testing himself or herself so that the auditor's own work provides the principal evidence for the auditor's opinion is of paramount importance to the auditor's assurance providing the level of reliability that investors expect. However, the Board also decided that the final standard should articulate clearly that the auditor's judgment about whether he or she has obtained the principal evidence required is qualitative as well as quantitative. Therefore, the standard now states, "Because the amount of work related to obtaining sufficient evidence to support an opinion about the effectiveness of controls is not susceptible to precise measurement, the auditor's judgment about whether he or she has obtained the principal evidence for the opinion will be qualitative as well as quantitative. For example, the auditor might give more weight to work performed on pervasive controls and in areas such as the control environment than on other controls, such as controls over low-risk, routine transactions."

E45. The Board also concluded that a better balance could be achieved in the standard by instructing the auditor to factor into the determination of the extent to which to use the work of others an evaluation of the nature of the controls on which others performed their procedures.

E46. Paragraph 112 of the standard provides the following factors the auditor should consider when evaluating the nature of the controls subjected to the work of others:

- The materiality of the accounts and disclosures that the control addresses and the risk of material misstatement.
- The degree of judgment required to evaluate the operating effectiveness of the control (that is, the degree to which the evaluation of the effectiveness of the control requires evaluation of subjective factors rather than objective testing).
- The pervasiveness of the control.
- The level of judgment or estimation required in the account or disclosure.
- The potential for management override of the control.

E47. As these factors increase in significance, the need for the auditor to perform his or her own work on those controls increases. As these factors decrease in significance, the auditor may rely more on the work of others. Because of the nature of controls in the control environment, however, the standard does not allow the auditor to use the work of others to reduce the amount of work he or she performs on such controls. In addition, the standard also

does not allow the auditor to use the work of others in connection with the performance of walkthroughs of major classes of transactions because of the high degree of judgment required when performing them (See separate discussion in paragraphs E51 through E57).

E48. The Board decided that this approach was responsive to those who believed that the auditor should be able to use his or her judgment in determining the extent to which to use the work of others. The Board designed the requirement that the auditor's own work must provide the principal evidence for the auditor's opinion as one of the boundaries within which the auditor determines the work he or she must perform himself or herself in the audit of internal control over financial reporting. The other instructions about using the work of others provide more specific direction about how the auditor makes this determination, but allow the auditor significant flexibility to use his or her judgment to determine the work necessary to obtain the principal evidence, and to determine when the auditor can use the work of others rather than perform the work himself or herself. Although some of the directions are specific and definitive, such as the directions for the auditor to perform tests of controls in the control environment and walkthroughs himself or herself, the Board decided that these areas were of such audit importance that the auditor should always perform this testing as part of obtaining the principal evidence for his or her opinion. The Board concluded that this approach appropriately balances the use of auditor judgment and the risk of inappropriate overreliance.

E49. The Board was particularly concerned by comments that issuers might choose to reduce their internal audit staff or the extent of internal audit testing in the absence of a significant change in the proposed standard that would significantly increase the extent to which the auditor may use the work of internal auditors. The Board believes the standard makes clear that an effective internal audit function does permit the auditor to reduce the work that otherwise would be necessary.

E50. Finally, as part of clarifying the linkage between the degree of competence and objectivity of the others and the ability to use their work, the Board decided that additional clarification should be provided on the extent of testing that should be required of the work of others. The Board noted that the interaction of the auditor performing walkthroughs of every significant process and the retention of the principal evidence provision precluded the need for the auditor to test the work of others in every significant account. However, testing the work of others is an important part of an ongoing assessment of their competence and objectivity. Therefore, as part of the emphasis on the direct relationship between the assessed level of competence and objectivity to the extent of the use of the work of others, additional provisions were added discussing how the results of the testing of the work of others might affect the auditor's assessment of competence and objectivity. The Board also concluded that testing the work of others

should be clearly linked to an evaluation of the quality and effectiveness of their work.

#### Walkthroughs

E51. The proposed standard included a requirement that the auditor perform walkthroughs, stating that the auditor should perform a walkthrough for all of the company's significant processes. In the walkthrough, the auditor was to trace all types of transactions and events, both recurring and unusual, from origination through the company's information systems until they were included in the company's financial reports. As stated in the proposed standard, walkthroughs provide the auditor with evidence to:

- Confirm the auditor's understanding of the process flow of transactions;
- Confirm the auditor's understanding of the design of controls identified for all five components of internal control over financial reporting, including those related to the prevention or detection of fraud;
- Confirm that the auditor's understanding of the process is complete by determining whether all points in the process at which misstatements related to each relevant financial statement assertion that could occur have been identified;
- Evaluate the effectiveness of the design of controls; and
- Confirm whether controls have been placed in operation.

E52. A number of commenters expressed strong support for the requirement for the auditor to perform walkthroughs as described in the proposed standard. They agreed that auditors who did not already perform the type of walkthrough described in the proposed standard should perform them as a matter of good practice. These commenters further recognized that the first-hand understanding an auditor obtains from performing these walkthroughs puts the auditor in a much better position to design an effective audit and to evaluate the quality and effectiveness of the work of others. They considered the walkthrough requirement part of "getting back to basics," which they viewed as a positive development.

E53. Some commenters expressed general support for walkthroughs as required procedures, but had concerns about the scope of the work. A number of commenters suggested that requiring walkthroughs of all significant processes and all types of transactions would result in an overwhelming and unreasonable number of walkthroughs required. Commenters made various suggestions for alleviating this problem, including permitting the auditor to determine, using broad auditor judgment, which classes of transactions to walk through or refining the scope of "all types of transactions" to include some kind of consideration of risk and materiality.

E54. Other commenters believed that required walkthroughs would result in excessive cost if the auditor were prohibited from using the work of others. These commenters suggested that the only way that required walkthroughs would be a reasonable procedure is to permit the auditor to use the work of others. Although commenters varied on whether the auditor's use of the work of

others for walkthroughs should be liberal or limited, and whether it should include management or be limited to internal auditors, a large number of commenters suggested that limiting walkthroughs to only the auditor himself or herself was impractical.

E55. The Board concluded that the objectives of the walkthroughs cannot be achieved second-hand. For the objectives to be effectively achieved, the auditor must perform the walkthroughs himself or herself. Several commenters who objected to the prohibition on using the work of internal auditors for walkthroughs described situations in which internal auditors would be better able to effectively perform walkthroughs because internal auditors understood the company's business and controls better than the external auditor and because the external auditor would struggle in performing walkthroughs due to a lack of understanding. The Board observed that these commenters' perspectives support the importance of requiring the external auditor to perform walkthroughs. If auditors struggle to initially perform walkthroughs because their knowledge of the company and its controls is weak, then that situation would only emphasize the necessity for the auditor to increase his or her level of understanding. After considering the nature and extent of the procedures that would be required to achieve these objectives, the Board concluded that performing walkthroughs would be the most efficient means of doing so. The first-hand understanding the auditor will obtain of the company's processes and its controls through the walkthroughs will translate into increased effectiveness and quality throughout the rest of the audit, in a way that cannot be achieved otherwise.

E56. The Board also decided that the scope of the transactions that should be subjected to walkthroughs should be more narrowly defined. To achieve the objectives the Board intended for walkthroughs to accomplish, the auditor should not be forced to perform walkthroughs on what many commenters reasoned was an unreasonably large population. The Board decided that the auditor should be able to use judgment in considering risk and materiality to determine which transactions and events within a given significant process to walk through. As a result, the directions in the standard on determining significant processes and major classes of transactions were expanded, and the population of transactions for which auditors will be required to walk through narrowed by replacing "all types of transactions" with "major classes of transactions."

E57. Although judgments of risk and materiality are inherent in identifying major classes of transactions, the Board decided to also remove from the standard the statement, "walkthroughs are required procedures" as a means of further clarifying that auditor judgment plays an important role in determining the major classes of transactions for which to perform a walkthrough. The Board observed that leading off the discussion of walkthroughs in the standard with such a sentence could be read as setting a tone that diminished the role of judgment

in selecting the transactions to walk through. As a result, the directions in the standard on performing walkthroughs begin with, "The auditor should perform at least one walkthrough for each major class of transactions \* \* \*". The Board's decision to eliminate the statement "walkthroughs are required procedures" should not be viewed as an indication that performing walkthroughs are optional under the standard's directions. The Board believes the auditor might be able to achieve the objectives of a walkthrough by performing a combination of procedures, including inquiry, inspection, observation, and reperformance; however, performing a walkthrough represents the most efficient and effective means of doing so. The auditor's work on the control environment and walkthroughs is an important part of the principal evidence that the auditor must obtain himself or herself.

#### Small Business Issues

E58. Appendix E of the proposed standard discussed small and medium-sized company considerations. Comments were widely distributed on this topic. A number of commenters indicated that the proposed standard gave adequate consideration to how internal control is implemented in, and how the audit of internal control over financial reporting should be conducted at, small and medium-sized companies. Other commenters, particularly smaller issuers and smaller audit firms, indicated that the proposed standard needed to provide much more detail on how internal control over financial reporting could be different at a small or medium-sized issuer and how the auditor's approach could differ. Some of these commenters indicated that the concepts articulated in the Board's proposing release concerning accommodations for small and medium-sized companies were not carried through to the proposed standard itself.

E59. On the other hand, other commenters, particularly large audit firms and investors, expressed views that the proposed standard went too far in creating too much of an accommodation for small and medium-sized issuers. In fact, many believed that the proposed standard permitted those issuers to have less effective internal control over financial reporting than larger issuers, while providing guidance to auditors permitting them to perform less extensive testing at those small and medium-sized issuers than they might have at larger issuers. These commenters stressed that effective internal control over financial reporting is equally important at small and medium-sized issuers. Some commenters also expressed concerns that the guidance in proposed Appendix E appeared to emphasize that the actions of senior management, if carried out with integrity, could offset deficiencies in internal control over financial reporting, such as the lack of written policies and procedures. Because the risk of management override of controls is higher in these types of environments, such commenters were concerned that the guidance in proposed Appendix E might result in an increased fraud risk at small and medium-sized issuers. At a minimum, they argued, the

interpretation of Appendix E might result in a dangerous expectation gap for users of their internal control reports. Some commenters who were of this view suggested that Appendix E be deleted altogether or replaced with a reference to the report of the Committee of Sponsoring Organizations (COSO) of the Treadway Commission, *Internal Control-Integrated Framework*, which they felt contained sufficient guidance on small and medium-sized company considerations.

E60. Striking an appropriate balance regarding the needs of smaller issuers is particularly challenging. The Board considered cautionary views about the difficulty in expressing accommodations for small and medium-sized companies without creating an inappropriate second class of internal control effectiveness and audit assurance. Further, the Board noted that the COSO framework currently provides management and the auditor with more guidance and flexibility regarding small and medium-sized companies than the Board had provided in the proposed Appendix E. As a result, the Board eliminated proposed Appendix E and replaced the appendix with a reference to COSO in paragraph 15 of the standard. The Board believes providing internal control criteria for small and medium-sized companies within the internal control framework is more appropriately within the purview of COSO. Furthermore, the COSO report was already tailored for special small and medium-sized company considerations. The Board decided that emphasizing the existing guidance within COSO was the best way of recognizing the special considerations that can and should be given to small and medium-sized companies without inappropriately weakening the standard to which these smaller entities should, nonetheless, be held. If additional tailored guidance on the internal control framework for small and medium-sized companies is needed, the Board encourages COSO, or some other appropriate body, to develop this guidance.

#### Evaluation of the Effectiveness of the Audit Committee

E61. The proposed standard identified a number of circumstances that, because of their likely significant negative effect on internal control over financial reporting, are significant deficiencies as well as *strong indicators* that a material weakness exists. A particularly notable significant deficiency and strong indicator of a material weakness was the ineffective oversight by the audit committee of the company's external financial reporting and internal control over financial reporting. In addition, the proposed standard required the auditor to evaluate factors related to the effectiveness of the audit committee's oversight of the external financial reporting process and the internal control over financial reporting.

E62. This provision related to evaluating the effectiveness of the audit committee was included in the proposed standard for two primary reasons. First, the Board initially decided that, because of the significant role that the audit committee has in the control environment and monitoring components of

internal control over financial reporting, an ineffective audit committee is a gravely serious control weakness that is strongly indicative of a material weakness. Most auditors should have already been reaching this conclusion when confronted with an obviously ineffective audit committee. Second, highlighting the adverse consequences of an ineffective audit committee would, perhaps, further encourage weak audit committees to improve.

E63. Investors supported this provision. They expressed an expectation that the auditor would evaluate the audit committee's effectiveness and speak up if the audit committee was determined to be ineffective. Investors drew a link among restoring their confidence, audit committees having new and enhanced responsibilities, and the need for assurance that audit committees are, in fact, meeting their responsibilities.

E64. Auditors also were generally supportive of such an evaluation. However, many requested that the proposed standard be refined to clearly indicate that the auditor's responsibility to evaluate the effectiveness of the audit committee's oversight of the company's external financial reporting and internal control over financial reporting is not a separate and distinct evaluation. Rather, the evaluation is one element of the auditor's overall understanding and assessment of the company's control environment and monitoring components. Some commenters suggested that, in addition to needing clarification of the auditor's responsibility, the auditor would have difficulty in evaluating all of the factors listed in the proposed standard, because the auditor's normal interaction with the audit committee would not provide sufficient basis to conclude on some of those factors.

E65. Issuers and some others were opposed to the auditor evaluating the effectiveness of the audit committee on the fundamental grounds that such an evaluation would represent an unacceptable conflict of interest. Several commenters shared the view that this provision would reverse an important improvement in governance and audit quality. Whereas the auditor was formerly retained and compensated by management, the Act made clear that these responsibilities should now be those of the audit committee. In this way, commenters saw a conflict of interest being remedied. Requiring the auditor to evaluate the effectiveness of the audit committee led commenters to conclude that the same kind of conflict of interest was being reestablished. These commenters also believed that the auditor would not have a sufficient basis on which to evaluate the effectiveness of the audit committee because the auditor does not have complete and free access to the audit committee, does not have appropriate expertise to evaluate audit committee members (who frequently are more experienced businesspeople than the auditor), does not have the legal expertise to make determinations about some of the specific factors listed in the proposed standard, and other shortcomings. These commenters also emphasized that the board of directors' evaluation of the audit committee is important and that the

proposed standard could be read to supplant this important evaluation with that of the auditor's.

E66. The Board concluded that this provision should be retained but decided that clarification was needed to emphasize that the auditor's evaluation of the audit committee was not a separate evaluation but, rather, was made as part of the auditor's evaluation of the control environment and monitoring components of internal control over financial reporting. The Board reasoned that clarifying both this context and limitation on the auditor's evaluation of the audit committee would also address, to some degree, the conflict-of-interest concerns raised by other commenters. The Board also observed, however, that conflict is, to some extent, inherent in the duties that society expects of auditors. Just as auditors were expected in the past to challenge management when the auditor believed a material misstatement of the financial statements or material weakness in internal control over financial reporting existed, the auditor similarly is expected to speak up when he or she believes the audit committee is ineffective in its oversight.

E67. The Board decided that when the auditor is evaluating the control environment and monitoring components, if the auditor concludes that the audit committee's oversight of the company's external financial reporting and internal control over financial reporting is ineffective, the auditor should be strongly encouraged to consider that situation a material weakness and, at a minimum, a significant deficiency. The objective of the evaluation is not to grade the effectiveness of the audit committee along a scale. Rather, in the course of performing procedures related to evaluating the effectiveness of the control environment and monitoring components, including evaluating factors related to the effectiveness of the audit committee's oversight, if the auditor concludes that the audit committee's oversight of the external financial reporting and internal control over financial reporting is ineffective, then the auditor should consider that a strong indicator of a material weakness.

E68. The Board concluded that several refinements should be made to this provision. As part of emphasizing that the auditor's evaluation of the audit committee is to be made as part of evaluating the control environment and not as a separate evaluation, the Board determined that the evaluation factors should be modified. The factors that addressed compliance with listing standards and sections of the Act were deleted, because those factors were specifically criticized in comment letters as being either outside the scope of the auditor's expertise or outside the scope of internal control over financial reporting. The Board also believed that those factors were not significant to the type of evaluation the auditor was expected to make of the audit committee. The Board decided to add the following factors, which are based closely on factors described in COSO, as relevant to evaluating those who govern, including the audit committee:

- Extent of direct and independent interaction with key members of financial

management, including the chief financial officer and chief accounting officer.

- Degree to which difficult questions are raised and pursued with management and the auditor, including questions that indicate an understanding of the critical accounting policies and judgmental accounting estimates.

- Level of responsiveness to issues raised by the auditor, including those required to be communicated by the auditor to the audit committee.

E69. The Board also concluded that the standard should explicitly acknowledge that the board of directors is responsible for evaluating the effectiveness of the audit committee and that the auditor's evaluation of the control environment is not intended to supplant those evaluations. In addition, the Board concluded that, in the event the auditor determines that the audit committee's oversight is ineffective, the auditor should communicate that finding to the full board of directors. This communication should occur regardless of whether the auditor concludes that the condition represents a significant deficiency or a material weakness, and the communication should take place in addition to the normal communication requirements that attach to those deficiencies.

#### **Definitions of Significant Deficiency and Material Weakness**

E70. As part of developing the proposed standard, the Board evaluated the existing definitions of significant deficiency (which the SEC defined as being the same as a reportable condition) and material weakness to determine whether they would permit the most effective implementation of the internal control reporting requirements of the Act.

E71. AU sec. 325, *Communication of Internal Control Related Matters Noted in an Audit*, defined a material weakness as follows:

*A material weakness in internal control is a reportable condition in which the design or operation of one or more of the internal control components does not reduce to a relatively low level the risk that misstatements caused by error or fraud in amounts that would be material in relation to the financial statements being audited may occur and not be detected within a timely period by employees in the normal course of performing their assigned functions.*

E72. The framework that defined a material weakness focused on likelihood of and magnitude for evaluating a weakness. The Board decided that this framework would facilitate effective implementation of the Act's internal control reporting requirements; therefore, the Board's proposed definitions focused on likelihood and magnitude. However, as part of these deliberations, the Board decided that likelihood and magnitude needed to be defined in terms that would encourage more consistent application.

E73. Within the existing definition of material weakness, the magnitude of "material in relation to the financial statements" was well supported by the professional standards, SEC rules and guidance, and other literature. However, the Board decided that the definition of likelihood would be improved if it used

"more than remote" instead of "relatively low level." FASB Statement No. 5, *Accounting for Contingencies* (FAS No. 5) defines "remote." The Board decided that, because auditors were familiar with the application of the likelihood definitions in FAS No. 5, using "more than remote" in the definition of material weakness would infuse the evaluation of whether a control deficiency was a material weakness with the additional consistency that the Board wanted to encourage.

E74. AU sec. 325 defined *reportable conditions* as follows: \* \* \* matters coming to the auditor's attention that, in his judgment, should be communicated to the audit committee because they represent significant deficiencies in the design or operation of internal control, which could adversely affect the organization's ability to initiate, record, process, and report financial data consistent with the assertions of management in the financial statements.

E75. The Board observed that this definition makes the determination of whether a condition is reportable solely a matter of the auditor's judgment. The Board believed that this definition was insufficient for purposes of the Act because management also needs a definition to determine whether a deficiency is significant and that the definition should be the same as the definition used by the auditor. Furthermore, using this existing definition, the auditor's judgment could never be questioned.

E76. The Board decided that the same framework that represented an appropriate framework for defining a material weakness also should be used for defining a significant deficiency. Although auditor judgment is integral and essential to the audit process (including in determining the severity of control weaknesses), auditors, nonetheless, must be accountable for their judgments. Increasing the accountability of auditors for their judgments about whether a condition represents a significant deficiency and increasing the consistency with which those judgments are made are interrelated. Hence, the same framework of likelihood and magnitude were applied in the Board's proposed definition of significant deficiency.

E77. In applying the likelihood and magnitude framework to defining a significant deficiency, the Board decided that the "more than remote" likelihood of occurrence used in the definition of material weakness was the best benchmark. In terms of magnitude, the Board decided that "more than inconsequential" should be the threshold for a significant deficiency.

E78. A number of commenters were supportive of the definitions in the proposed standard. These commenters believed the definitions were an improvement over the previous definitions, used terms familiar to auditors, and would promote increased consistency in evaluations.

E79. Most commenters, however, objected to these definitions. The primary, overarching objection was that these definitions set too low a threshold for the reporting of significant deficiencies. Some commenters focused on "more than remote" likelihood as the driver of an unreasonably low threshold, while others believed "more than

inconsequential” in the definition of significant deficiency was the main culprit. While some commenters understood “more than inconsequential” well enough, others indicated significant concerns that this represented a new term of art that needed to be accompanied by a clear definition of “inconsequential” as well as supporting examples. Several commenters suggested retaining the likelihood and magnitude approach to a definition but suggested alternatives for likelihood (such as reasonably likely, reasonably possible, more likely than not, probable) and magnitude (such as material, significant, insignificant).

E80. Some commenters suggested that the auditing standard retain the existing definitions of material weakness and significant deficiency, consistent with the SEC’s final rules implementing Section 404. In their final rules, the SEC tied management’s assessment to the existing definitions of material weakness and significant deficiency (through the existing definition of a reportable condition) in AU sec. 325. These commenters suggested that, if the auditing standard used a different definition, a dangerous disconnect would result, whereby management would be using one set of definitions under the SEC’s rules and auditors would be using another set under the Board’s auditing standards. They further suggested that, absent rulemaking by the SEC to change its definitions, the Board should simply defer to the existing definitions.

E81. A number of other commenters questioned the reference to “a misstatement of the annual or interim financial statements” in the definitions, with the emphasis on why “interim” financial statements were included in the definition, since Section 404 required only an annual assessment of internal control over financial reporting effectiveness, made as of year-end. They questioned whether this definition implied that the auditor was required to identify deficiencies that could result in a misstatement in interim financial statements; they did not believe that the auditor should be required to plan his or her audit of internal control over financial reporting at a materiality level of the interim financial statements.

E82. The Board ultimately concluded that focusing the definitions of material weakness and significant deficiency on likelihood of misstatement and magnitude of misstatement provides the best framework for evaluating deficiencies. Defaulting to the existing definitions would not best serve the public interest nor facilitate meaningful and effective implementation of the auditing standard.

E83. The Board observed that the SEC’s final rules requiring management to report on internal control over financial reporting define material weakness, for the purposes of the final rules, as having “the same meaning as the definition under GAAS and attestation standards.” Those rules state:

The term “significant deficiency” has the same meaning as the term “reportable condition” as used in AU § 325 and AT§ 501. The terms “material weakness” and “significant deficiency” both represent deficiencies in the design or operation of

internal control that could adversely affect a company’s ability to record, process, summarize and report financial data consistent with the assertions of management in the company’s financial statements, with a “material weakness” constituting a greater deficiency than a “significant deficiency.” Because of this relationship, it is our judgment that an aggregation of significant deficiencies could constitute a material weakness in a company’s internal control over financial reporting.<sup>42</sup>

E84. The Board considered the SEC’s choice to cross-reference to generally accepted auditing standards (GAAS) and the attestation standards as the means of defining these terms, rather than defining them outright within the final rules, noteworthy as it relates to the question of whether any disconnect could result between auditors’ and managements’ evaluations if the Board changed the definitions in its standards. Because the standard changes the definition of these terms within the interim standards, the Board believes the definitions are, therefore, changed for both auditors’ and managements’ purposes.

E85. The Board noted that commenters who were concerned that the definitions in the proposed standard set too low of a threshold for significant deficiencies and material weaknesses believed that the proposed standard required that each control deficiency be evaluated in isolation. The intent of the proposed standard was that control deficiencies should first be evaluated individually; the determination as to whether they are significant deficiencies or material weaknesses should be made considering the effects of compensating controls. The effect of compensating controls should be taken into account when assessing the likelihood of a misstatement occurring and not being prevented or detected. The proposed standard illustrated this type of evaluation, including the effect of compensating controls when assessing likelihood, in the examples in Appendix D. Based on the comments received, however, the Board determined that additional clarification within the standard was necessary to emphasize the importance of considering compensating controls when evaluating the likelihood of a misstatement occurring. As a result, the note to paragraph 10 was added.

E86. The Board concluded that considering the effect of compensating controls on the likelihood of a misstatement occurring and not being prevented or detected sufficiently addressed the concerns that the definitions set too low a threshold. For example, several issuer commenters cited concerns that the proposed definitions precluded a rational cost-benefit analysis of whether to correct a deficiency. These issuers believed they would be compelled to correct deficiencies (because the deficiencies would be considered to be at least significant deficiencies) in situations in which management had made a previous conscious

decision that the costs of correcting the deficiency outweighed the benefits. The Board observed that, in cases in which management has determined not to correct a known deficiency based on a cost-benefit analysis, effective compensating controls usually lie at the heart of management’s decision. The standard’s use of “likelihood” in the definition of a significant deficiency or material weakness accommodates such a consideration of compensating controls. If a deficiency is effectively mitigated by compensating controls, then the likelihood of a misstatement occurring and not being prevented or detected may very well be remote.

E87. The Board disagreed with comments that “more than inconsequential” was too low a threshold; however, the Board decided the term “inconsequential” needed additional clarity. The Board considered the term “inconsequential” in relation to the SEC’s guidance on audit requirements and materiality. Section 10A(b)(1)(B)<sup>43</sup> describes the auditor’s communication requirements when the auditor detects or otherwise becomes aware of information indicating that an illegal act has or may have occurred, “unless the illegal act is clearly inconsequential.” Staff Accounting Bulletin (SAB) No. 99, *Materiality*, provides the most recent and definitive guidance on the concept of materiality as it relates to the financial reporting of a public company. SAB No. 99 uses the term “inconsequential” in several places to draw a distinction between amounts that are not material. SAB No. 99 provides the following guidance to assess the significance of a misstatement:

Though the staff does not believe that registrants need to make finely calibrated determinations of significance with respect to immaterial items, plainly it is “reasonable” to treat misstatements whose effects are clearly inconsequential differently than more significant ones.

E88. The discussion in the previous paragraphs provided the Board’s context for using “material” and “more than inconsequential” for the magnitude thresholds in the standard’s definitions. “More than inconsequential” indicates an amount that is less than material yet has significance.

E89. The Board also considered the existing guidance in the Board’s interim standards for evaluating materiality and accumulating audit differences in a financial statement audit. Paragraph .41 of AU sec. 312, *Audit Risk and Materiality in Conducting an Audit*, states:

In aggregating likely misstatements that the entity has not corrected, pursuant to paragraphs .34 and .35, the auditor may designate an amount below which misstatements need not be accumulated. This amount should be set so that any such misstatements, either individually or when aggregated with other such misstatements, would not be material to the financial statements, after the possibility of further undetected misstatements is considered.

E90. The Board considered the discussion in AU sec. 312 that spoke specifically to

<sup>42</sup> See footnote 73 to *Final Rule: Management’s Reports on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports*, Securities and Exchange Commission Release No. 33–8238 (June 5, 2003) [68 FR 36636].

<sup>43</sup> See Section 10A of the Securities Exchange Act of 1934, 15 U.S.C. 78j–1.

evaluating differences individually *and in the aggregate*, as well as to considering the possibility of additional undetected misstatements, important distinguishing factors that should be carried through to the evaluation of whether a control deficiency represents a significant deficiency because the magnitude of the potential misstatement is more than inconsequential.

E91. The Board combined its understanding of the salient concepts in AU sec. 312 and the SEC guidance on materiality to develop the following definition of inconsequential:

A misstatement is *inconsequential* if a reasonable person would conclude, after considering the possibility of further undetected misstatements, that the misstatement, either individually or when aggregated with other misstatements, would clearly be immaterial to the financial statements. If a reasonable person could not reach such a conclusion regarding a particular misstatement, that misstatement is *more than inconsequential*.

E92. Finally, the inclusion of *annual or interim financial statements* in the definitions rather than just “annual financial statements” was intentional and, in the Board’s opinion, closely aligned with the spirit of what Section 404 seeks to accomplish. However, the Board decided that this choice needed clarification within the auditing standard. The Board did not intend the inclusion of the interim financial statements in the definition to require the auditor to perform an *audit of internal control over financial reporting* at each interim date. Rather, the Board believed that the SEC’s definition of internal control over financial reporting included all financial reporting that a public company makes publicly available. In other words, internal control over financial reporting includes controls over the preparation of annual and quarterly financial statements. Thus, an evaluation of internal control over financial reporting as of year-end encompasses controls over the annual financial reporting and quarterly financial reporting as such controls exist at that point in time.

E93. Paragraphs 76 and 77 of the standard clarify this interpretation, as part of the discussion of the period-end financial reporting process. The period-end financial reporting process includes procedures to prepare both annual and quarterly financial statements.

#### **Strong Indicators of Material Weaknesses and DeFacto Significant Deficiencies**

E94. The proposed standard identified a number of circumstances that, because of their likely significant negative effect on internal control over financial reporting, are significant deficiencies as well as strong indicators that a material weakness exists. The Board developed this list to promote increased rigor and consistency in auditors’ evaluations of weaknesses. For the implementation of Section 404 of the Act to achieve its objectives, the public must have confidence that all material weaknesses that exist as of the company’s year-end will be publicly reported. Historically, relatively few material weaknesses have been reported by

the auditor to management and the audit committee. That condition is partly due to the nature of a financial statement audit. In an audit of only the financial statements, the auditor does not have a detection responsibility for material weaknesses in internal control; such a detection responsibility is being newly introduced for all public companies through Sections 103 and 404 of the Act. However, the Board was concerned about instances in which auditors had identified a condition that should have been, but was not, communicated as a material weakness. The intention of including the list of strong indicators of material weaknesses in the proposed standard was to bring further clarity to conditions that were likely to be material weaknesses in internal control and to create more consistency in auditors’ evaluations.

E95. Most commenters were generally supportive of a list of significant deficiencies and strong indicators of the existence of material weaknesses. They believed such a list provided instructive guidance to both management and the auditor. Some commenters, however, disagreed with the proposed approach of providing such a list. They believed that the determination of the significance of a deficiency should be left entirely to auditor judgment. A few commenters requested clarification of the term “strong indicator” and specific guidance on how and when a “strong indicator” could be overcome. A number of commenters expressed various concerns with individual circumstances included in the list.

- *Restatement of previously issued financial statements to reflect the correction of a misstatement.* Some commenters expressed concern about the kinds of restatements that would trigger this provision. A few mentioned the specific instance in which the restatement reflected the SEC’s subsequent view of an accounting matter when the auditor, upon reevaluation, continued to believe that management had reasonable support for its original position. They believed this specific circumstance would not necessarily indicate a significant deficiency in internal control over financial reporting. Others commented that a restatement of previously issued financial statements would indicate a significant deficiency and strong indicator of a material weakness *in the prior period* but not necessarily in the current period.

- *Identification by the auditor of a material misstatement in financial statements in the current period that was not initially identified by the company’s internal control over financial reporting (even if management subsequently corrects the misstatement).* Several commenters, issuers and auditors alike, expressed concern about including this circumstance on the list. They explained that, frequently, management is completing the preparation of the financial statements at the same time that the auditor is completing his or her auditing procedures. In the face of this “strong indicator” provision, a lively debate of “who found it first” would ensue whenever the auditor identifies a misstatement that management subsequently corrects. Another argument is that the company’s controls would have

detected a misstatement identified by the auditor if the controls had an opportunity to operate (that is, the auditor performed his or her testing before the company’s controls had an opportunity to operate). Several issuers indicated that they would prevent this latter situation by delaying the auditor’s work until the issuers had clearly completed their entire period-end financial reporting process—a delay they viewed as detrimental.

- *For larger, more complex entities, the internal audit function or the risk assessment function is ineffective.* Several commenters asked for specific factors the auditor was expected to use to assess the effectiveness of these functions.

- *For complex entities in highly regulated industries, an ineffective regulatory compliance function.* Several commenters, particularly issuers in highly regulated industries, objected to the inclusion of this circumstance because they believed this to be outside the scope of internal control over financial reporting. (They agreed that this would be an internal control-related matter, but one that falls into operating effectiveness and compliance with laws and regulations, not financial reporting.) Many of these commenters suggested that this circumstance be deleted from the list altogether. Fewer commenters suggested that this problem could be addressed by simply clarifying that this circumstance is limited to situations in which the ineffective regulatory function relates solely to those aspects for which related violations of laws and regulations could have a direct and material effect on the financial statements.

- *Identification of fraud of any magnitude on the part of senior management.* Several commenters expressed concern that the inclusion of this circumstance created a detection responsibility for the auditor such that the auditor would have to plan and perform procedures to detect fraud of *any magnitude* on the part of senior management. Others expressed concern that identification of fraud on the part of senior management by the company’s system of internal control over financial reporting might indicate that controls were operating effectively rather than indicating a significant deficiency or material weakness. Still others requested clarification on how to determine who constituted “senior management.”

E96. A couple of commenters also suggested that an ineffective control environment should be added to the list.

E97. The Board concluded that the list of significant deficiencies and strong indicators of material weakness should be retained. Such a list will promote consistency in auditors’ and managements’ evaluations of deficiencies consistent with the definitions of significant deficiency and material weakness. The Board also decided to retain the existing structure of the list. Although the standard leaves auditor judgment to determine whether those deficiencies are material weaknesses, the existence of one of the listed deficiencies is by definition a significant deficiency. Furthermore, the “strong indicator” construct allows the auditor to factor extenuating or unique circumstances into the evaluation and possibly to conclude that the situation does not represent a

material weakness, rather, only a significant deficiency.

E98. The Board decided that further clarification was not necessary within the standard itself addressing specifically how and when a "strong indicator" can be overcome. The term "strong indicator" was selected as opposed to the stronger "presumption" or other such term precisely because the Board did not intend to provide detailed instruction on how to overcome such a presumption. It is, nevertheless, the Board's view that auditors should be biased toward considering the listed circumstances as material weaknesses.

E99. The Board decided to clarify several circumstances included in the list:

- *Restatement of previously issued financial statements to reflect the correction of a misstatement.* The Board observed that the circumstance in which a restatement reflected the SEC's subsequent view of an accounting matter, when the auditor concluded that management had reasonable support for its original position, might present a good example of only a significant deficiency and not a material weakness. However, the Board concluded that requiring this situation to, nonetheless, be considered by definition a significant deficiency is appropriate, especially considering that the primary result of the circumstance being considered a significant deficiency is the communication of the matter to the audit committee. Although the audit committee might already be well aware of the circumstances of any restatement, a restatement to reflect the SEC's view on an accounting matter at least has implications for the quality of the company's accounting principles, which is already a required communication to the audit committee.

With regard to a restatement being a strong indicator of a material weakness in the prior period but not necessarily the current period, the Board disagreed with these comments. By virtue of the restatement occurring during the current period, the Board views it as appropriate to consider that circumstance a strong indicator that a material weakness existed during the current period. Depending on the circumstances of the restatement, however, the material weakness may also have been corrected during the current period. The construct of the standard does not preclude management and the auditor from determining that the circumstance was corrected prior to year-end and, therefore, that a material weakness did not exist at year-end. The emphasis here is that the circumstance is a strong indicator that a material weakness exists; management and the auditor will separately need to determine whether it has been corrected. The Board decided that no further clarification was needed in this regard.

- *Identification by the auditor of a material misstatement in financial statements in the current period that was not initially identified by the company's internal control over financial reporting (even if management subsequently corrects the misstatement).* Regarding the "who-found-it-first" dilemma, the Board recognizes that this circumstance will present certain implementation challenges. However, the

Board decided that none of those challenges were so significant as to require eliminating this circumstance from the list. When the Board developed the list of strong indicators, the Board observed that it is not uncommon for the financial statement auditor to identify material misstatements in the course of the audit that are corrected by management prior to the issuance of the company's financial statements. In some cases, management has relied on the auditor to identify misstatements in certain financial statement items and to propose corrections in amount, classification, or disclosure. With the introduction of the requirement for management and the auditor to report on the effectiveness of internal control over financial reporting, it becomes obvious that this situation is unacceptable, unless management is willing to accept other than an unqualified report on the internal control effectiveness. (This situation also raises the question as to the extent management may rely on the annual audit to produce accurate and fair financial statements without impairing the auditor's independence.) This situation is included on the list of strong indicators because the Board believes it will encourage management and auditors to evaluate this situation with intellectual honesty and to recognize, first, that the company's internal control should provide reasonable assurance that the company's financial statements are presented fairly in accordance with generally accepted accounting principles.

Timing might be a concern for some issuers. However, to the extent that management takes additional steps to ensure that the financial information is correct prior to providing it to their auditors, this may, at times, result in an improved control environment. When companies and auditors work almost simultaneously on completing the preparation of the annual financial statements and the audit, respectively, the role of the auditor can blur with the responsibility of management. In the year-end rush to complete the annual report, some companies might have come to rely on their auditors as a "control" to further ensure no misstatements are accidentally reflected in the financial statements. The principal burden seems to be for management's work schedule and administration of their financial reporting deadlines to allow the auditor sufficient time to complete his or her procedures.

Further, if the auditor initially identified a material misstatement in the financial statements but, given the circumstances, determined that management ultimately would have found the misstatement, the auditor could determine that the circumstance was a significant deficiency but not a material weakness. The Board decided to retain the provision that this circumstance is at least a significant deficiency because reporting such a circumstance to the audit committee would always be appropriate.

- *For larger, more complex entities, the internal audit function or the risk assessment function is ineffective.* Relatively few commenters requested clarification on how to evaluate these functions. The Board expects that most auditors will not have

trouble making this evaluation. Similar to the audit committee evaluation, this evaluation is not a separate evaluation of the internal audit or risk assessment functions but, rather, is a way of requiring the auditor to speak up if either of these functions is obviously ineffective at an entity that needs them to have an effective monitoring or risk assessment component. Unlike the audit committee discussion, most commenters seemed to have understood that this was the context for the internal audit and risk assessment function evaluation. Nonetheless, the Board decided to add a clarifying note to this circumstance emphasizing the context.

- *For complex entities in highly regulated industries, an ineffective regulatory compliance function.* The Board decided that this circumstance, as described in the proposed standard, would encompass aspects that are outside internal control over financial reporting (which would, of course, be inappropriate for purposes of this standard given its definition of internal control over financial reporting). The Board concluded that this circumstance should be retained, though clarified, to only apply to those aspects of an ineffective regulatory compliance function that could have a material effect on the financial statements.

- *Identification of fraud of any magnitude on the part of senior management.* The Board did not intend to create any additional detection responsibility for the auditor; rather, it intended that this circumstance apply to fraud on the part of senior management that came to the auditor's attention, regardless of amount. The Board decided to clarify the standard to make this clear. The Board noted that identification of fraud by the company's system of internal control over financial reporting might indicate that controls were operating effectively, except when that fraud involves senior management. Because of the critical role of tone-at-the-top in the overall effectiveness of the control environment and due to the significant negative evidence that fraud of any magnitude on the part of senior management reflects on the control environment, the Board decided that it is appropriate to include this circumstance in the list, regardless of whether the company's controls detected the fraud. The Board also decided to clarify who is included in "senior management" for this purpose.

E100. The Board agreed that an ineffective control environment was a significant deficiency and a strong indicator that a material weakness exists and decided to add it to the list.

### Independence

E101. The proposed standard explicitly prohibited the auditor from accepting an engagement to provide an internal control-related service to an audit client that has not been specifically pre-approved by the audit committee. In other words, the audit committee would not be able to pre-approve internal control-related services as a category. The Board did not propose any specific guidance on permissible internal control-related services in the proposed standard but, rather, indicated its intent to conduct an in-depth evaluation of independence

requirements in the future and highlighted its ability to amend the independence information included in the standard pending the outcome of that analysis.

E102. Comments were evenly split among investors, auditors, and issuers who believed the existing guidance was sufficient versus those who believed the Board should provide additional guidance. Commenters who believed existing guidance was sufficient indicated that the SEC's latest guidance on independence needed to be given more time to take effect given its recency and because existing guidance was clear enough. Commenters who believed more guidance was necessary suggested various additions, from more specificity about permitted and prohibited services to a sweeping ban on any internal control-related work for an audit client. Other issuers commented about auditors participating in the Section 404 implementation process at their audit clients in a manner that could be perceived as affecting their independence.

E103. Some commenters suggested that the SEC should change the pre-approval requirements on internal control-related services to specific pre-approval. Another commenter suggested that specific pre-approval of all internal control-related services would pose an unreasonable burden on the audit committee and suggested reverting to pre-approval by category.

E104. The Board clearly has the authority to set independence standards as it may deem necessary or appropriate in the public interest or for the protection of investors. Given ongoing concerns about the appropriateness of auditors providing these types of services to audit clients, the fact-specific nature of each engagement, and the critical importance of ongoing audit committee oversight of these types of services, the Board continues to believe that specific pre-approval of internal control-related services is a logical step that should not pose a burden on the audit committee beyond that which effective oversight of financial reporting already entails. Therefore, the standard retains this provision unchanged.

#### **Requirement for Adverse Opinion When a Material Weakness Exists**

E105. The existing attestation standard (AT sec. 501) provides that, when the auditor has identified a material weakness in internal control over financial reporting, depending on the significance of the material weakness and its effect on the achievement of the objectives of the control criteria, the auditor may qualify his or her opinion ("except for the effect of the material weakness, internal control over financial reporting was effective") or express an adverse opinion ("internal control over financial reporting was not effective").

E106. The SEC's final rules implementing Section 404 state that, "Management is not permitted to conclude that the registrant's internal control over financial reporting is effective if there are one or more material weaknesses in the registrant's internal control over financial reporting."

In other words, in such a case, management must conclude that internal

control over financial reporting is not effective (that is, a qualified or "except-for" conclusion is not acceptable).

E107. The Board initially decided that the reporting model for the auditor should follow the required reporting model for management. Therefore, because management is required to express an "adverse" conclusion in the event a material weakness exists, the auditor's opinion also must be adverse. The proposed standard did not permit a qualified audit opinion in the event of a material weakness.

E108. Comments received on requiring an adverse opinion when a material weakness exists were split. A large number affirmed that this seemed to be the only logical approach, based on a philosophical belief that if a material weakness exists, then internal control over financial reporting is ineffective. These commenters suggested that permitting a qualified opinion would be akin to creating another category of control deficiency—material weaknesses that were really material (resulting in an adverse opinion) and material weaknesses that weren't so material (resulting in a qualified opinion).

E109. A number of commenters agreed that the auditor's report must follow the same model as management's reporting, but they believe strongly that the SEC's guidance for management accommodated either a qualified or adverse opinion when a material weakness existed.

E110. These commenters cited Section II.B.3.c of the SEC Final Rule and related footnote no. 72: The final rules therefore preclude management from determining that a company's internal control over financial reporting is effective if it identifies one or more material weaknesses in the company's internal control over financial reporting. This is consistent with interim attestation standards. *See* AT sec. 501.

E111. They believe this reference to the interim attestation standard in the SEC Final Rule is referring to paragraph .37 of AT sec. 501, which states, in part, Therefore, the presence of a material weakness will preclude the practitioner from concluding that the entity has effective internal control. However, depending on the significance of the material weakness and its effect on the achievement of the objectives of the control criteria, the practitioner may qualify his or her opinion (that is, express an opinion that internal control is effective "except for" the material weakness noted) or may express an adverse opinion.

E112. Their reading of the SEC Final Rule and the interim attestation standard led them to conclude that it would be appropriate for the auditor to express either an adverse opinion or a qualified "except-for" opinion about the effectiveness of the company's internal control over financial reporting depending on the circumstances.

E113. Some commenters responded that they thought a qualified opinion would be appropriate in certain cases, such as an acquisition close to year-end (too close to be able to assess controls at the acquiree).

E114. After additional consultation with the SEC staff about this issue, the Board decided to retain the proposed reporting

model in the standard. The primary reason for that decision was the Board's continued understanding that the SEC staff would expect only an adverse conclusion from management (not a qualified conclusion) in the event a material weakness existed as of the date of management's report.

E115. The commenters who suggested that a qualified opinion should be permitted in certain circumstances, such as an acquisition close to year-end, were essentially describing scope limitations. The standard permits a qualified opinion, a disclaimer of opinion, or withdrawal from the engagement if there are restrictions on the scope of the engagement. As it relates specifically to acquisitions near year-end, this is another case in which the auditor's model needs to follow the model that the SEC sets for management. The standard added a new paragraph to Appendix B permitting the auditor to limit the scope of his or her work (without referring to a scope limitation in the auditor's report) in the same manner that the SEC permits management to limit its assessment. In other words, if the SEC permits management to exclude an entity acquired late in the year from a company's assessment of internal control over financial reporting, then the auditor could do the same.

#### **Rotating Tests of Controls**

E116. The proposed standard directed the auditor to perform tests of controls on "relevant assertions" rather than on "significant controls." To comply with those requirements, the auditor would be required to apply tests to those controls that are important to presenting each relevant assertion in the financial statements. The proposed standard emphasized controls that affect relevant assertions because those are the points at which misstatements could occur. However, it is neither necessary to test all controls nor to test redundant controls (unless redundancy is itself a control objective, as in the case of certain computer controls). Thus, the proposed standard encouraged the auditor to identify and test controls that addressed the primary areas in which misstatements could occur, yet limited the auditor's work to only the necessary controls.

E117. Expressing the extent of testing in this manner also simplified other issues involving extent of testing decisions from year to year (the so-called "rotating tests of controls" issue). The proposed standard stated that the auditor should vary testing from year to year, both to introduce unpredictability into the testing and to respond to changes at the company. However, the proposed standard maintained that each year's audit must stand on its own. Therefore, the auditor must obtain evidence of the effectiveness of controls over all relevant assertions related to all significant accounts and disclosures every year.

E118. Auditors and investors expressed support for these provisions as described in the proposed standard. In fact, some commenters compared the notion of rotating tests of control in an audit of internal control over financial reporting to an auditor testing accounts receivable only once every few years in a financial statement audit.

Permitting so-called rotation of testing would compromise the auditor's ability to obtain reasonable assurance that his or her opinion was correct.

E119. Others, especially issuers concerned with limiting costs, strongly advocated some form of rotating tests of controls. Some commenters suggested that the auditor should have broad latitude to perform some cursory procedures to determine whether any changes had occurred in controls and, if not, to curtail any further testing in that area. Some suggested that testing as described in the proposed standard should be required in the first year of the audit (the "baseline" year) and that in subsequent years the auditor should be able to reduce the required testing. Others suggested progressively less aggressive strategies for reducing the amount of work the auditor should be required to perform. In fact, several commenters (primarily internal auditors) described "baselining" controls as an important strategy to retain. They argued, for example, that IT application controls, once tested, could be relied upon (without additional testing) in subsequent years as long as general controls over program changes and access controls were effective and continued to be tested.

E120. The Board concluded that each year's audit must stand on its own. Cumulative audit knowledge is not to be ignored; some natural efficiencies will emerge as the auditor repeats the audit process. For example, the auditor will frequently spend less time to obtain the requisite understanding of the company's internal control over financial reporting in subsequent years compared with the time necessary in the first year's audit of internal control over financial reporting. Also, to the extent that the auditor has previous knowledge of control weaknesses, his or her audit strategy should, of course, reflect that knowledge. For example, a pattern of mistakes in prior periods is usually a good indicator of the areas in which misstatements are likely to occur. However, the absence of fraud in prior periods is not a reasonable indicator of the likelihood of misstatement due to fraud.

E121. However, the auditor needs to test controls every year, regardless of whether controls have obviously changed. Even if nothing else changed about the company—no changes in the business model, employees, organization, etc.—controls that were effective last year may not be effective this year due to error, complacency, distraction, and other human conditions that result in the inherent limitations in internal control over financial reporting.

E122. What several commenters referred to as "baselining" (especially as it relates to IT controls) is more commonly referred to by auditors as "benchmarking." This type of testing strategy for application controls is not precluded by the standard. However, the Board believes that providing a description of this approach is beyond the scope of this standard. For these reasons, the standard does not address it.

#### **Mandatory Integration With the Audit of the Financial Statements**

E123. Section 404(b) of the Act provides that the auditor's attestation of management's

assessment of internal control shall not be the subject of a separate engagement. Because the objectives of and work involved in performing both an attestation of management's assessment of internal control over financial reporting and an audit of the financial statements are closely interrelated, the proposed auditing standard introduced an integrated audit of internal control over financial reporting and audit of financial statements.

E124. However, the proposed standard went even further. Because of the potential significance of the information obtained during the audit of the financial statements to the auditor's conclusions about the effectiveness of internal control over financial reporting, the proposed standard stated that the auditor could not audit internal control over financial reporting without also auditing the financial statements. (However, the proposed standard retained the auditor's ability to audit *only* the financial statements, which might be necessary in the case of certain initial public offerings.)

E125. Although the Board solicited specific comment on whether the auditor should be prohibited from performing an audit of internal control over financial reporting without also performing an audit of the financial statements, few commenters focused on the significance of the potentially negative evidence that would be obtained during the audit of the financial statements or the implications of this prohibition. Most commenters focused on the wording of Section 404(b), which indicates that the auditor's attestation of management's assessment of internal control over financial reporting shall not be the subject of a separate engagement. Based on this information, most commenters saw the prohibition in the proposed standard as superfluous and benign.

E126. Several commenters recognized the importance of the potentially negative evidence that might be obtained as part of the audit of the financial statements and expressed strong support for requiring that an audit of financial statements be performed to audit internal control over financial reporting.

E127. Others recognized the implications of this prohibition and expressed concern: What if a company wanted or needed an opinion on the effectiveness of internal control over financial reporting as of an interim date? For the most part, these commenters (primarily issuers) objected to the implication that an auditor would have to audit a company's financial statements as of an interim date to enable him or her to audit and report on its internal control over financial reporting as of that same interim date. Other issuers expressed objections related to their desires to engage one auditor to provide an opinion on the effectiveness of internal control over financial reporting and another to audit the financial statements. Others requested clarification about which guidance would apply when other forms of internal control work were requested by companies.

E128. The Board concluded that an auditor should perform an audit of internal control

over financial reporting only when he or she has also audited company's financial statements. The auditor *must* audit the financial statements to have a high level of assurance that his or her conclusion on the effectiveness of internal control over financial reporting is correct. Inherent in the reasonable assurance provided by the auditor's opinion on internal control over financial reporting is a responsibility for the auditor to plan and perform his or her work to obtain reasonable assurance that material weaknesses, if they exist, are detected. As previously discussed, this standard states that the identification by the auditor of a *material misstatement* in the financial statements that was not initially identified by the company's internal control over financial reporting, is a strong indicator of a material weakness. Without performing a financial statement audit, the auditor would not have reasonable assurance that he or she had detected all material misstatements. The Board believes that allowing the auditor to audit internal control over financial reporting without also auditing the financial statements would not provide the auditor with a high level of assurance and would mislead investors in terms of the level of assurance obtained.

E129. In response to other concerns, the Board noted that an auditor can report on the effectiveness of internal control over financial reporting using existing AT sec. 501 for purposes other than satisfying the requirements of Section 404. This standard supersedes AT sec. 501 only as it relates to complying with Section 404 of the Act.

E130. Although reporting under the remaining provisions of AT sec. 501 is currently permissible, the Board believes reports issued for public companies under the remaining provisions of AT sec. 501 will be infrequent. In any event, additional rulemaking might be necessary to prevent confusion that might arise from reporting on internal control engagements under two different standards. For example, explanatory language could be added to reports issued under AT sec. 501 to clarify that an audit of financial statements was not performed in conjunction with the attestation on internal control over financial reporting and that such a report is not the report resulting from an audit of internal control over financial reporting performed in conjunction with an audit of the financial statements under this standard. This report modification would alert report readers, particularly if such a report were to appear in an SEC filing or otherwise be made publicly available, that the assurance obtained by the auditor in that engagement is different from the assurance that would have been obtained by the auditor for Section 404 purposes. Another example of the type of change that might be necessary in separate rulemaking to AT sec. 501 would be to supplement the performance directions to be comparable to those in this standard. Auditors should remain alert for additional rulemaking by the Board that affects AT sec. 501.

#### **(b) Statutory Basis**

The statutory basis for the proposed rule is Title I of the Act.

*B. Board's Statement on Burden on Competition*

The Board does not believe that the proposed rule will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Pursuant to Sections 404 and 103 of the Act, each registered public accounting firm that prepares or issues the audit report for an issuer shall attest to, and report on, the assessment of internal control made by the management of the issuer. Although compliance with the proposed rule will impose costs, those costs are necessary in order to implement the requirements of Sections 103 and 404 of the Act and will be imposed in a way that does not disproportionately or unnecessarily burden competition.

*C. Board's Statement on Comments on the Proposed Rule Received from Members, Participants or Others*

The Board released the proposed rule for public comment in PCAOB Release No. 2003-017 (October 7, 2003). A copy of PCAOB Release No. 2003-017 and the comment letters received in response to the PCAOB's request for comment are available on the PCAOB's web site at [www.pcaobus.org](http://www.pcaobus.org). The Board received

193 written comments. The Board has clarified and modified certain aspects of the proposed rule and the instructions to the related form in response to comments it received, as discussed in Appendix E, *Background and Basis for Conclusions*, to the proposed rule.

**III. Date of Effectiveness of the Proposed Rule and Timing for Commission Action**

Within 60 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Board consents the Commission will:

- (a) By order approve such proposed rule; or
- (b) Institute proceedings to determine whether the proposed rule should be disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule is consistent with the requirements of Title I of the Act. Comments may be

submitted electronically or by paper. Electronic comments may be submitted by: (1) Electronic form on the SEC Web site (<http://www.sec.gov>) or (2) e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Mail paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609. All submissions should refer to File No. PCAOB-2004-03; this file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov>). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW, Washington, DC 20549. We do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All comments should be submitted on or before May 7, 2004.

By the Commission.

**J. Lynn Taylor,**

*Assistant Secretary.*

[FR Doc. 04-8412 Filed 4-15-04; 8:45 am]

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# Federal Register

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**Friday,  
April 16, 2004**

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## **Part III**

## **Department of Agriculture**

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### **Food and Nutrition Service**

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#### **7 CFR Parts 272 and 273**

#### **Food Stamp Program: Eligibility and Certification Provisions of the Farm Security and Rural Investment Act of 2002; Proposed Rule**

**DEPARTMENT OF AGRICULTURE****Food and Nutrition Service****7 CFR Parts 272 and 273**

RIN 0584-AD30

**Food Stamp Program: Eligibility and Certification Provisions of the Farm Security and Rural Investment Act of 2002****AGENCY:** Food and Nutrition Service, USDA.**ACTION:** Proposed rule.

**SUMMARY:** This rulemaking proposes to amend Food Stamp Program regulations to implement 11 provisions of the Farm Security and Rural Investment Act of 2002 that establish new eligibility and certification requirements for the receipt of food stamps. This rule would: Allow States, at their option, to treat legally obligated child support payments to a non-household member as an income exclusion rather than a deduction; allow a State option to exclude certain types of income that are not counted under the State's Temporary Assistance for Needy Families (TANF) cash assistance or Medicaid programs; replace the current, fixed standard deduction with a deduction that varies according to household size and is adjusted annually for cost-of-living increases; allow States to simplify the Standard Utility Allowance (SUA) if the State elects to use the SUA rather than actual utility costs for all households; allow States to use a standard deduction from income of \$143 per month for homeless households with some shelter expenses; allow States to disregard reported changes in deductions during certification periods except for changes associated with a new residence or earned income until the next recertification; increase the resource limit for households with a disabled member from \$2,000 to \$3,000 consistent with the limit for households with an elderly member; allow States to exclude certain types of resources that the State does not count for TANF or Medicaid (section 1931); allow States to extend simplified reporting of changes to all households not exempt from periodic reporting; require State agencies that have a Web site to post applications on these sites in the same languages that the State uses for its written applications; allow States to extend from the current 3 months up to 5 months the period of time households may receive transitional food stamp benefits when they lose TANF cash assistance; and restore food stamp eligibility to qualified aliens who are

otherwise eligible and who are receiving disability benefits regardless of date of entry, are under 18 regardless of date of entry, or have lived in the United States for 5 years as a qualified alien beginning on date of entry.

**DATES:** Comments must be received on or before June 15, 2004, to be assured of consideration.

**ADDRESSES:** The Food and Nutrition Service invites interested persons to submit comments on this proposed rule. Comments may be submitted by any of the following methods:

- Mail: Send comments to: Matthew Crispino, Program Analyst, Certification Policy Branch, Program Development Division, Food and Nutrition Service, USDA, 3101 Park Center Drive, Room 800, Alexandria Virginia, 22302, (703) 305-2490.
- E-Mail: Send comments to [fsphq-web@fns.usda.gov](mailto:fsphq-web@fns.usda.gov).
- Fax: Submit comments by facsimile transmission to (703) 305-2486.
- Disk or CD-ROM: Submit comments on disk or CD-ROM to Mr. Crispino at the above address.
- Hand Delivery or Courier: Deliver comments to Mr. Crispino at the above address.
- Federal eRulemaking Portal: Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

All written comments will be open for public inspection at the office of the Food and Nutrition Service during regular business hours (8:30 a.m. to 5 p.m., Monday through Friday) at 3101 Park Center Drive, Alexandria, Virginia, Room 812.

**FOR FURTHER INFORMATION CONTACT:** Questions regarding the proposed rulemaking should be addressed to Mr. Crispino at the above address or by telephone at 703-305-2490.

**SUPPLEMENTARY INFORMATION:****Executive Order 12866**

This proposed rule has been determined to be economically significant and was reviewed by the Office of Management and Budget in conformance with Executive Order 12866.

**Regulatory Impact Analysis***Need for Action*

This action is required to implement provisions of the Farm Security and Rural Investment Act of 2002 (FSRIA) (Pub. L. 107-171), which was enacted on May 13, 2002. This rulemaking proposes to amend Food Stamp Program regulations to implement 11 provisions of FSRIA that establish new eligibility and certification requirements for the

receipt of food stamps. We have estimated the total Food Stamp Program costs to the Government of the FSRIA provisions implemented in the proposed rule as \$595 million in fiscal year (FY) 2004 and \$4.504 billion over the five years FY 2004 through FY 2008. The majority of the costs arise from Section 4103 of FSRIA, the standard deduction; Section 4104, the SUA; Section 4109, Reporting Requirements; Section 4115, Transitional Benefits; and Section 4401, Restoration of Benefits to Legal Immigrants. The costs of the remaining provisions in the rule are minimal and, therefore, will not be discussed in this analysis.

**Standard Deduction—Section 4103**

*Discussion:* This provision replaces a fixed standard deduction (used in calculating a household's benefit level) with one that is adjusted annually and that varies by household size. This rule provides that: (1) For the 48 contiguous States, the District of Columbia, Hawaii, Alaska, and the U.S. Virgin Islands, the standard deduction will be equal to 8.31 percent of the Food Stamp Program's monthly net income limit for household sizes up to six; (2) for Guam, the standard deduction will be equal to two times the monthly net income standard for household sizes up to six; (3) for the 48 contiguous States, the District of Columbia, Hawaii, Alaska, the U.S. Virgin Islands, and Guam, households with more than six members must receive the same standard deduction as a six-person household; and (4) the standard deduction for any household must not fall below the standard deduction in effect in FY 2002.

*Effect on Low-Income Families:* This provision will affect some low-income families not already receiving the maximum food stamp benefit by allowing them to claim a larger standard deduction and to obtain higher food stamp benefits. Larger households will be affected by the provision at implementation and smaller households will be affected over time as the new values of the standard deduction rise with inflation.

*Cost Impact:* We estimate that the cost to the Government of this provision will be \$99 million in FY 2004 and \$624 million over the five years, FY 2004 through FY 2008. These impacts are already incorporated into the President's FY 2005 budget baseline.

First, the new standard deduction values were projected for each household size (one-person through six or more-persons) for each year. The new standard deduction values were based on monthly poverty guideline values by household size, as calculated by the

U.S. Department of Health and Human Services (HHS) and used for food stamp eligibility standards. The guidelines are published in February or March of each year and are the Food Stamp Program net income limits in the following fiscal year. The poverty guidelines used for setting the FY 2004 food stamp net income limits were published on February 7, 2003 and are the most current set available. The poverty threshold values for use in FY 2005 and beyond were calculated by inflating the FY 2004 values by the Consumer Price Index for All Urban Consumers from the Office of Management and Budget's economic assumptions for the President's FY 2005 budget. For each household size, these values were multiplied by 8.31 percent and the product was compared to the current standard deduction value of \$134, the higher of which was adopted as the new standard deduction level. (For example, the monthly poverty threshold for a five-person household was \$1,795 in FY 2004. Multiplying this value by 8.31 percent yields a product of \$149, which is larger than the current standard deduction value of \$134. The new standard deduction value would be \$149.)

Second, the number of households affected for each household size and in each year was estimated based on participation projections from the President's FY 2005 budget baseline of December 2003. The projections were adjusted based on data on the

proportion of households of each size not receiving the maximum allotment, from the Food and Nutrition Service (FNS) report, *Characteristics of Food Stamp Households: Fiscal Year 2002*, the most recent data available. Households already receiving the maximum allotment are excluded because even though the larger standard deduction decreases their net income, their benefits cannot increase. [For example, according to the report, 5.8 percent of all households were five-person households, 13.8 percent of which received the maximum benefit. The number of households was calculated as the total number of persons divided by the average household size of 2.32 persons per household, from the 2002 FNS report. The number of five-person households affected by the provision was calculated as 10,211,000 total households times 5.8 percent (in five-person households) times 86.2 percent (not receiving the maximum benefit)—equal to 511,000 households affected.]

The cost of this provision was then calculated for each household size in each year. The cost equaled the product of the change in the standard deduction value for the household size, times the number of households affected, times 12 months, times a benefit reduction rate of 37.5 percent. This benefit reduction rate represents the average change in benefits for each dollar change in the standard deduction. Because the excess shelter deduction is calculated based on

a household's gross income less all other deductions, a change in the standard deduction yields an interaction with the shelter deduction for some households. According to the 2002 Characteristics report, about half of food stamp households claim a shelter deduction that is expected to increase with an increase in the standard deduction. Among these households, the benefit reduction rate is 45 percent. The remaining half of food stamp households do not claim a shelter deduction or already receive the maximum shelter deduction allowable and will not experience the added impact of a shelter deduction change. Among these households, the benefit reduction rate is 30 percent. Taking the weighted average of these two groups yields a benefit reduction rate of 37.5 percent. (For five-person households in FY 2004, the cost of this provision was estimated as a \$15 change in the standard deduction (\$149–\$134), times 511,000 households, times 12 months, times 37.5 percent—equal to about \$35 million.)

The individual costs for each household size were summed in each year and rounded to the nearest million dollars.

#### **Expected Dollar Increase in the Food Stamp Standard Deduction by Household Size and Fiscal Years 2004 Through 2013**

| Household Size | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 |
|----------------|------|------|------|------|------|------|------|------|------|------|
| 1 person       | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    |
| 2 persons      | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    |
| 3 persons      | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    | 0    |
| 4 persons      | 0    | 0    | 0    | 0    | 3    | 7    | 10   | 14   | 17   | 21   |
| 5 persons      | 15   | 17   | 20   | 23   | 27   | 31   | 35   | 39   | 43   | 48   |
| 6+ persons     | 37   | 39   | 42   | 46   | 50   | 55   | 59   | 64   | 69   | 74   |

**Participation Impacts:** While we do not expect this provision to significantly increase food stamp participation, we estimate that setting the standard deduction equal to 8.31 percent of poverty by household size will raise benefits among households currently participating. In FY 2004, households with five or more persons will be affected by this provision. Four-person households are expected to be affected beginning in FY 2008. Persons in smaller households will be affected in later years, as the indexed values of 8.31 percent of the poverty guidelines for

their household size exceed \$134. The number of persons affected was calculated from the number of household affected, times the number of persons per households, summed across household sizes. In FY 2004, we expect 4.9 million persons to receive an average of \$1.70 more per month in food stamp benefits as a result of this provision.

**Uncertainty:** Because these estimates are largely based on recent food stamp quality control data, they have a high level of certainty. To the extent that the distribution of food stamp households

by household size and income changes over time, the cost to the Government could be larger or smaller. To the extent that actual poverty guidelines are higher or lower than projected, the cost to the Government could be larger or smaller.

#### **Simplified Utility Allowance—Section 4104**

**Discussion:** This provision simplifies current rules relating to the standard utility allowance (SUA) when the State agency elects to make the SUA mandatory. The rule provides that State agencies which elect to make the SUA

mandatory: (1) May provide an SUA that includes heating or cooling costs to residents of public housing units which have central utility meters and which charge the households only for excess heating or cooling costs; and (2) must not prorate the SUA when a household shares living quarters with others. The rule also provides that in determining if a State agency's mandatory SUAs are cost neutral, the Department must not count any increase in cost that is due to providing an SUA that includes heating or cooling costs to residents of certain public housing units or to eliminating proration of the SUA for a household that shares living quarters and expenses with others.

*Effect on Low-Income Households:* This provision will increase the shelter deduction and raise food stamp benefits among low-income households in shared living arrangements and certain public housing situations to the extent they reside in States with mandatory SUA policies. This provision will decrease the shelter deduction and lower food stamp benefits among low-income households with high utility expenses to the extent that they reside in States who will adopt mandatory SUA policies as a result of this provision.

*Cost Impact:* We estimate that the cost to the Government of this provision will be \$204 million in FY 2005, the first year it is expected to be fully implemented, and \$980 million over the five years FY 2004 through FY 2008. These impacts are already incorporated into the President's FY 2005 budget baseline.

According to individual State SUA plans, there were 11 States with mandatory SUA policies in FY 2002. Based on participant data from the National Data Bank, those mandatory SUA States served 25 percent of food stamp participants in FY 2002. Telephone conversations with State officials regarding their SUA policy intentions indicated that this provision is motivating a large number of States to move to mandatory SUAs. Based on those conversations, we assumed that by FY 2005, 75 percent of the remaining States would adopt mandatory SUAs. The cost impact of this provision includes three components: (1) Increased costs due to ending the SUA proration requirements; (2) increased costs due to extending the full heating and cooling SUA to certain households in public housing with shared utility meters; and (3) savings from limiting households with high utility expenses to the SUA value among States adopting a mandatory SUA policy as a result of this provision.

The estimate was based on food stamp cost projections from the President's FY 2005 budget baseline of December 2003. While we recognize that the President's FY 2005 budget baseline is an imperfect baseline for this analysis because it already incorporates the impacts of this provision, it is preferable to the alternatives because it reflects the most recent economic and participation trends. The national cost impact of ending the proration requirement of the heating and cooling SUA was estimated using food stamp quality control data from FY 2002, the most recent data available. QC data includes information on household circumstances, income and expenses and allows us to identify which households are currently prorating their SUA. Using this data, we were able to calculate the change in each household's benefit as a result of changing the SUA proration rules and estimate a national percentage increase in benefits (1.509 percent). This percentage increase was multiplied by the baseline cost projections from the President's FY 2005 budget baseline for each year. Since this provision is available only to those households in States with mandatory SUA policies, the costs were adjusted to account for the proportion of food stamp participants subject to mandatory SUA policies. As outlined above, we estimated that 25 percent of food stamp participants were subject to mandatory SUA policies prior to enactment and are therefore affected by this provision. Because of the large number of States expressing their desire to adopt mandatory SUA policies, we assumed that 25 percent of participants in the remaining States would adopt mandatory SUAs in FY 2003, growing to 50 percent in FY 2004, up to 75 percent in FY 2005 and beyond. This assumption was supported by current data showing that in FY 2003, 19 States had adopted mandatory SUA policies. These States account for about 42 percent of participants in FY 2003.

The national cost impact of extending the full heating and cooling SUA to certain households in public housing with shared utility meters was based on participation projections from the President's FY 2005 budget baseline of December 2003. Participation figures were divided by the average household size of 2.32 persons to estimate the total number of food stamp households from the FNS report, *Characteristics of Food Stamp Households: Fiscal Year 2002*. Based on tabulations of 2002 quality control data, 39.2 percent of households reported positive utility expenses lower than their State's SUA. These are generally households who are claiming

actual utility expenses rather than the SUA when determining their excess shelter expense deduction and are likely to be affected by this provision. Their average utility expenses were estimated as \$109 and the average SUA value was \$244. Based on data from the U.S. Department of Housing and Urban Development (HUD), about 8 percent of these households were assumed to live in public housing. Based on multiple conversations with officials from HUD, the U.S. Department of Energy, utility companies, and building associations, the proportion of those households with shared utility meters was assumed to be five percent. The national cost for the provision was then determined by multiplying the number of affected households (39.2 percent of the baseline number of households in each fiscal year) times the average difference in the utility expenses used for the shelter deduction (\$244 less \$109 = \$135) times 12 months times a benefit reduction rate of 30 percent. The benefit reduction rate represents how much benefits change for each dollar change in the excess shelter deduction. Again, the national cost was then adjusted to reflect the proportion of food stamp participants subject to mandatory SUA policies and therefore affected by the provision—25 percent of participants at enactment with a phase-in up to 75 percent of participants in remaining States in FY 2005 and beyond.

The national savings impact of limiting households with high utility expenses to a mandatory SUA was simulated using the 1999 MATH SIPP simulation model, the most recent model available. This model was used because SIPP contains information on households characteristics, income and expenses, including the information about household utility expenses necessary to estimate changes in household benefits resulting from changes to their excess shelter expenses deduction value. The national impact of the provision was estimated as a percentage decrease (–0.836 percent). This percentage was multiplied by the baseline cost projections for each year and the product was adjusted to reflect the proportion of food stamp participants expected to be made newly subject to a mandatory SUA as a result of this provision (phased-in up to 75 percent of the remaining participants in FY 2005 and beyond).

The impacts of the three components were summed and rounded to the nearest million dollars.

*Participation Impact:* In FY 2005, the first year fully implemented, 2,145,000 persons are expected to gain an average of \$12.72 per month in food stamp

benefits as a result of this provision. In addition, 2,178,000 persons are expected to lose an average of \$4.71 per month in food stamp benefits, including 11,000 persons who will lose eligibility and no longer participate in the Food Stamp Program. The number of persons made newly eligible by this provision is expected to be minimal.

Participation effects were estimated using the same methodology as the cost estimate. The simulation results from quality control data and MATH SIPP produced participation impacts for those gaining benefits, losing benefits and losing eligibility for those affected by eliminating the SUA proration requirement and households with high utility expenses made newly subject to a mandatory SUA. The impacts, expressed as a percent change from the model's baselines, were multiplied by the participation projections in the President's FY 2005 budget baseline of December 2003, and were adjusted according to the methodology outlined for the cost estimate. The number of persons in households affected by the public housing component of the provision was estimated by taking the number of households affected times the average number of persons per household. The estimates from the individual components were then summed.

*Uncertainty:* The estimate of this provision has a moderate level of certainty. The analyses are largely based on the results of computer simulation models of large national datasets, which yield fairly precise estimates. Data on which States will choose to adopt this option is quite strong, as it is based on telephone conversations with every State and recent information about their policy choices. The weakest part of the estimate is assumption about the number of households in public housing with shared meters. Despite an extensive search, data on this subject were difficult to obtain. The assumption that 5 percent of families in public housing have shared meters is a best guess, but is fairly uncertain. To the extent that the actual number of households with shared meters is smaller or larger, costs to the Government of this provision would be lower or higher.

#### **Simplified Determination of Deductions—Section 4106, and State Option To Reduce Reporting Requirements—Section 4109**

*Discussion:* The provision of the rule implementing Section 4106 provides State agencies the option of disregarding until a household's next recertification any changes that affect the amount of

deductions for which a household is eligible. However, the State agency must act on any change in a household's excess shelter cost stemming from a change in residence and any changes in the household's earned income. The rule provides: (1) The State agency has the option of ignoring changes (other than changes in earned income and changes in shelter costs related to a change in residence) for all deductions or for any particular deduction; (2) the State agency may ignore changes for deductions for certain categories of households while acting on changes for those same deductions for other types of households; and (3) the State agency may not act on changes in only one direction; *i.e.*, if it chooses to act on changes that increase a household's deduction, it must also act on changes that would decrease the deduction.

The provision of the rule implementing Section 4109 provides State agencies the option to extend simplified reporting procedures, which are restricted to households with earnings under current rules, to all food stamp households. The rule provides that (1) the State agency may include any household certified for at least 4 months within a simplified reporting system; (2) households exempt from periodic reporting, including homeless households and migrant and seasonal farm workers, may be subject to simplified reporting but may not be required to submit periodic reports; (3) the State agency may require other households subject to simplified reporting to submit periodic reports on their circumstances from once every 4 months up to once every 6 months; and (4) households subject to simplified reporting must report when their monthly gross income exceeds the monthly gross income limit for their household size.

*Effect on Low-Income Families:* Low-income families who reside in States who implement this option may be impacted by this provision. Changes in household circumstances may be disregarded for up to 6 months, relieving a reporting burden on households.

*Cost impact:* The cost to the Government of section 4106—simplified determination of deductions is included in the cost estimate of section 4109—simplified reporting. The cost to the Government in FY 2004 is expected to be \$60 million. The five-year total for FY 2004 through FY 2008 is \$447 million. These impacts are already incorporated into the President's FY 2005 budget baseline.

Section 4106 allows States to disregard changes in deduction

amounts. The impact of this provision is assumed to be included in the cost of simplified reporting. Section 4109 extends the State option of simplified reporting to all households. In addition, FNS implemented a universal quarterly reporting system prior to passage of FSRIA. The details of these systems are similar enough that we took the estimated cost of universal quarterly reporting and multiplied by 2 (from 3 months to 6 months). We then subtracted out the cost to States already running a universal simplified reporting system by waiver and the States running a more limited simplified reporting system. Combined these States are Colorado, District of Columbia, Delaware, Georgia, Kentucky, Louisiana, Michigan, Maryland, Missouri, Montana, Nebraska, New Hampshire, New Jersey, Ohio, Oklahoma, Tennessee, West Virginia, and Wyoming (from Food Stamp Program State Operations Report, April 4, 2002). Together they account for 31 percent of all benefit costs; we assumed by extension that they account for 31 percent of the cost of simplified reporting (based on FY 2003 issuance from the National Data Bank). We then applied a State phase-in assuming this proposal will be taken up quickly and by a majority of the States. We assumed 25 percent of States will implement in FY 2003, 50 percent in FY 2004, and 75 percent in the remaining years. This provision benefits all households who are placed in this reporting system by reducing the frequency of reports they must submit. On average, the benefit impact per person is 44 cents per person per month in fiscal year 2006 when fully effective.

*Participation Impact:* This provision only affects current participants in the States that opt to implement. There are no new participants brought onto the program from this provision.

*Uncertainty:* There is a moderate level of certainty associated with this estimate. This estimate is based on previous reporting estimates that use SIPP longitudinal data to track how much circumstances change because of the new reporting rules. Added to that data is other quality control data on how accurate reports are that has a high level of certainty as well. However, since two different data sources are used and other out-of-model adjustments are made (including how many States would implement this option), the uncertainty is raised some.

#### **Transitional Food Stamps for Families Moving From Welfare—Section 4115**

*Discussion:* This provision expands the current option to provide

transitional benefits to households leaving the TANF program. The rule provides that State agencies: (1) May lengthen the maximum transitional period from up to three months to up to five months; (2) may extend the household's certification period beyond the limits established under current rules to provide the household with up to a full five months of transitional benefits; (3) must adjust the household's benefit in the transitional period to take into account the reduction in income due to the loss of TANF; (4) may further adjust the household's benefit in the transitional period to take into account changes in circumstances that it learns of from another program in which the household participates; (5) must permit the household to apply for recertification at any time during the transitional period; (6) may shorten the household's certification period in the final month of the transitional period and require the household to undergo recertification; and (7) must deny transitional benefits to households made ineligible for such benefits by law.

*Effect on Low-Income Families:* This provision impacts low-income families who leave TANF. If their State opts to provide transitional benefits, these families receive up to 5 months of transitional food stamps after they exit from TANF.

*Cost Estimate:* The cost to the Government of this provision in FY 2004 is \$78 million, and it costs \$446 million over the five years FY 2004 through FY 2008. These impacts are already incorporated into the President's FY 2005 budget baseline.

This estimate uses TANF baseline participation figures from the U.S. Department of Health and Human Services. We assumed only non-child-only cases would leave the TANF program and be eligible for a transitional food stamp benefit. Previous research found that about 65 percent of the caseload is non-child-only. After adjusting TANF participation figures to those that are non-child only (1.386 million families in FY 2004), we then applied a leaver's rate. This rate is based on previous state evaluations and averaged about 7.5 percent in 2001, which is lowered in each year by a constant rate of one third per year, because it was assumed that over time, fewer participants would leave either due to economic recession or due to severe personal difficulties making it very difficult to leave TANF. The leaver rate used in FY 2004 was 6.96 percent a month. We then adjusted for the percentage of TANF households who are not eligible for Food Stamp Program because of household definitional

issues. For example, TANF excludes persons that are included by the Food Stamp Program, and their inclusion makes the household ineligible for food stamps. This has remained constant at about 20 percent for many years (from TANF Annual Report to Congress). We then adjusted for those cases sanctioned off of TANF or sanctioned in the Food Stamp Program. The statute states that these cases are ineligible for a transitional benefit. About 6.2 percent of TANF cases are sanctioned each year (data from TANF National Report to Congress). Administrative data shows about 2 percent of Food Stamp Program cases are closed because of intentional program violations. We rounded this 8.2 percent to 10 percent to account for other program sanctions. Therefore, another 10 percent of TANF leavers are ineligible for the 5-month transitional benefit. Finally, we assumed that about half of the TANF leavers have no financial changes other than the loss of the TANF income and therefore their transitional Food Stamp benefit is not dramatically different from what they would have received under normal program rules. We scored the cost of the remaining 52 percent whose food stamp benefit is higher than what the household would have received otherwise. Based on the 2000 TANF report to Congress, we estimated that in FY 2004 there are 36,000 leavers eligible for the transitional benefit. The average food stamp benefit for TANF households in FY 2000 was about \$234 a month. However, the statute states that the Food Stamp Program benefit shall be adjusted due to the loss of TANF cash. The average TANF benefit was \$302 a month in FY 2000, which an HHS official suggested was a good estimate of the TANF benefit just prior to leaving TANF. A \$302 decrease in cash assistance produces a \$97 increase in Food Stamp Program benefits. Therefore, we assigned a monthly transitional benefit for each leaver household of \$330 in 2000. Inflated using the change in the thrifty food plan equals a \$368 monthly benefit in 2004. This amount times the number of leavers produces the gross cost per month. The cost of the transitional period is 4 times this monthly cost. The current process results in an extra month of benefits so the five-month traditional benefit period results in four extra months of benefits. The annual cost is the product times 12 months. However, we know that leavers tend to churn, that is, return to the program shortly after leaving. In these cases, the cost is reduced because they return to the Food Stamp Program even in the

absence of a transitional benefit. If the case returns in the first month, there is no additional savings since it takes one month to close a food stamp case normally. Returners in the second through fifth month, however, do generate savings. Data from the Department of Health and Human Services show that 5 percent of leavers return to TANF in the second month, 4 percent return in the third month, 3 percent return in the fourth month, and 2 percent return in the 5th month. After weighting these by the number of months transitional benefits would not be paid, we multiplied the percentage returning times the cost for the year. We then adjusted for the fact that some portion of the first year benefits will be paid in the second year. That is, if someone's transitional benefit starts in July; only 2 months of benefits will be paid in the first fiscal year. The remaining will be paid in the second fiscal year. We reduced the first year's cost by 17 percent to account for this. We then reduced the cost to avoid double counting what is already in the baseline (since States have been operating a 3 month transitional benefit).

Prior to the passage of FSRIA, some States had been operating a three-month transitional benefit option that FNS allowed via regulation. We assumed these States would move to the five-month option. The full cost of the three-month option was subtracted from the full cost of the five-month option to get the additional, or new, spending due to the legislative change.

Finally, we applied a State phase-in rate believing that this provision will be slowly implemented by States and that only a small portion of States will ever implement. Therefore, we took 10 percent of the cost in the first year, 20 percent in the second year, and 20 percent in the remaining years.

*Participation Impact:* We estimate that in FY 2004, an average of 36,000 TANF-leavers will receive the food stamp transitional benefit per month.

*Uncertainty:* There is a high level of uncertainty with this estimate. The estimate is based on projections of TANF participation over a ten-year period and studies done in only a few states about the behaviors of certain types of TANF leavers. In conjunction with OMB and HHS, these studies represented the best information available, although not necessarily nationally representative. Added to that is the state take-up rate, indicating how many States would take this option, which is highly uncertain and variable as time goes on.

**Section 4401: Restoration of Benefits to Legal Immigrants**

*Discussion:* This provision substantially expands eligibility for the Food Stamp Program for legal immigrants. It restores eligibility to three groups of legal immigrants in three stages. Effective October 1, 2002, legal immigrants who receive blindness or disability benefits became eligible to participate in the Food Stamp Program. Effective April 1, 2003, legal immigrants who have resided for at least five years in the United States as qualified aliens became eligible. Effective October 1, 2003, all legal immigrants under age 18 became eligible for benefits, regardless of when they first arrived in the United States. The statute and rule also remove sponsor deeming requirements for immigrant children.

*Effect on Low-Income Households:* These three provisions will affect low-income families who have legal immigrant members who are currently ineligible for benefits but become eligible after the provisions take effect. Many of these households contain U.S. born children who are currently eligible for food stamps but may not be participating. Most households that contain participating U.S. born children will receive larger benefits if the adults become eligible for benefits. Other households will consist entirely of newly eligible persons.

The people benefiting from the provision restoring eligibility to immigrants with five years legal residency are mostly living in households with children. About half of new participants live in households with earnings. Households with elderly and disabled are less likely to be affected, since elderly and disabled who were legally resident before August 22, 1996 are eligible under current law. In addition, a few legal immigrants receiving State-funded disability payments qualify for restored food stamp eligibility on the basis of receiving blindness or disability benefits; legal immigrants have not had eligibility for federal disability benefits restored. Lastly, foreign-born children who have legally resided in the United States for less than five years benefited from the provision restoring eligibility to children effective October 1, 2003.

*Cost Impact:* We estimate that the cost to the Government of all three provisions will be \$185 million in FY 2004 and \$1.829 billion over the five-year period of 2004–2008. The cost to the Government of restoring eligibility to disabled immigrants is \$3 million for FY 2004 and \$19 million over the five-year period of 2004–2008. The bulk of

the cost is from restoring eligibility to those legally resident in the United States for five years; the FY 2004 cost to the Government is \$160 million and \$1.522 billion over five years. The cost to the Government for restoring eligibility to legal resident children regardless of date of arrival in the United States is \$22 million for FY 2004 and \$288 million over the five-year period.

We estimated that a relatively small number of legal immigrants qualified for the October 1, 2002 restoration of benefits to the blind and disabled. This is because federal programs providing blindness or disability benefits to most legal immigrants are restricted to those who either were residing in the United States prior to August 22, 1996 (Supplemental Security Income) or have a significant work history (Social Security benefits). Both groups are currently eligible for food stamps. Only those participating in State-funded disability programs qualified for the October 1, 2002 restoration of food stamps. Some data from an Urban Institute study on the impact and implementation of these provisions indicates that of the eight States studied (California, Florida, Illinois, Massachusetts, New Jersey, North Carolina, Tennessee, and Texas), three of these States provided State-funded disability programs for immigrants. These three States (California, Massachusetts, and Texas) estimated that they restored benefits to 2,400 disabled immigrants. If one assumes that their average monthly benefit is similar to that of a person receiving General Assistance benefits, the cost for 2004 is \$3 million. The five-year cost is \$19 million for 2004–2008. There is no phase-in, because States providing State-funded disability payments to disabled aliens converted these immigrants to food stamps immediately after they became eligible.

The estimates for the other two provisions were based on food stamp cost projections from the President's FY 2005 budget baseline of December 2003.

The estimate for restoring eligibility to those with five years legal residency in the United States is based on a model that uses a combination of quality control data on participating legal immigrants from 1996 (prior to their restricted eligibility) with data on current participants and program rules for 2000. Based on this model, restoration of food stamp eligibility to those with five years' legal residency will increase benefit costs by 1.23 percent, for a total cost of \$299 million in 2004.

However, because the estimate is based on 2000 data and program rules, we made the following adjustments:

- The model only restores eligibility to those in the United States prior to 1996, because in order to have five years legal residency in 2000, an immigrant will need to have arrived no later than 1995. However, by 2004, people with five years residency will include those arriving in 1996, 1997, 1998, and 1999. By 2006, people with five years residency will also include those arriving in 2000, and 2001.

- Based on admissions data from the INS, we estimate that in 2004, 7.91 percent of noncitizens with five years legal residency will have arrived by 1996. Thus, the cost and number of new participants is adjusted upwards to account for the 1996 arrival cohort not captured under the model. With the adjustment, the cost is \$323 million in 2004.

- Based on admissions data from the INS, we estimate that in 2004, 15 percent of noncitizens with five years legal residency will have arrived in 1997, 1998, and 1999. By 2007, the percentage of post August 22, 1996 arrivals with five years residency will rise to 25 percent. These percentages are for non-aged, non-disabled adults; the model does not restore eligibility to any elderly, disabled, or children, since in 2000, all members from these groups who had five years residency would have been covered by the Agricultural Research, Extension and Education Reform Act of 1998 (AREERA) restorations. So we have to further adjust the percentage of post 1996 arrivals to include elderly, children, and those adults who would have qualified for federal disability payments using the pre-August 22, 1996 rules but are not currently eligible for those payments to become food stamp eligible on October 1, 2002. Since about 24 percent of all legal immigrants who received food stamps in 1996 were elderly, disabled, or children, the increase in costs accounting for post-1996 arrivals is estimated to be 18 percent in 2004 and 35 percent in 2008. With the adjustment, the cost is estimated to be \$384 million in 2004.

- We also expect that more legal immigrants will naturalize over the next few years. Based on estimates provided by the INS, we estimate that in 2004, an additional 16 percent of immigrants will naturalize relative to 2000. The estimate for 2008 is 20 percent. This adjustment reduces the cost of the restoration because naturalized citizens are eligible for food stamps even without implementation of this provision. Thus,

the cost estimate is adjusted downwards, to \$320 in 2004.

- We also phased in the impact over three years, because we expect it to take three years for the full participation impact to be realized. Finally, we halved the cost impact for 2003, since the provision takes effect on April 1, 2003, halfway through the Fiscal Year. After these adjustments, the expected benefit cost for FY 2004 is \$160 million.

We also estimated the impact of restoring only those children who had been in the country less than five years, since children with more than five years legal residency would be covered by the previous provision. The model estimated that this restoration would increase annual food stamp costs by 0.22 percent. We then multiplied the impact by the expected annual food stamp costs for each year as projected in the President's FY 2005 budget baseline of December 2003. We then made the following adjustments:

- The model only restores eligibility to children arriving in 1997, 1998, and 1999, since it is based on FY 2000 data and children arriving prior to 1997 were made eligible under AREERA.

Assuming that the number of children arriving legally in the United States in 2000 and 2001 is proportional to those arriving in the prior three years, we increased the impact by 67 percent (five years divided by three years = 1.67).

- We also assumed a lower participation rate among newly eligible children, since their immigrant parents would not be eligible to receive benefits for five years. We assumed the participation rate would be seventy-five percent.

- We made a further adjustment because California provides a State-funded benefit for ineligible immigrants. When calculating the Federal portion of the benefits issued by legal immigrants, California excludes the entire income of ineligible aliens, rather than pro-rating a portion to the eligible household members. This adjustment is a ten percent reduction in costs.

- The estimate for children does not include any children with more than five years' residency. However, five years' residency is required to become a United States citizen. Thus, the estimate for this provision does not contain any adjustment for naturalization.

- Finally, we assumed a three-year phase-in before the impact was fully realized. The expected cost to the Government for FY 2004 (the first year of implementation) is \$22 million.

The impacts of the three components were summed and rounded to the nearest million dollars.

*Participation Impact:* We estimate that by 2006, when the provision will be in full effect, an additional 513,000 legal immigrants will be participating in the Food Stamp Program. Some will be people currently covered by State-funded food assistance benefits. Some others will be individuals who live in a household with participating citizen children. Others will live in households where no one currently participates in the program.

We estimate that the provision that restores eligibility to those with five years legal residence in the United States will bring an estimated 437,000 legal immigrants on to the program by full implementation in fiscal year 2006. The average per-person monthly benefit in 2006 will be an estimated \$66. We estimate that the provision that restores eligibility to legal resident children will bring an additional 63,000 persons onto the Food Stamp Program by 2006. The average per-person monthly benefit in 2006 will be \$75. In addition, we estimate that about 3,000 legal immigrants will qualify for the restoration of benefits to the blind and disabled in FY 2006.

*Participation Impact:* Participation effects were estimated using the same methodology as the cost estimate. The simulation results of the QC Minimodel produced participation impacts. The impacts were multiplied by the participation projections for the FY 2005 President's budget baseline and were adjusted according to the methodology outlined for the cost estimate.

*Uncertainty:* The estimates for restoring eligibility to immigrants with five years legal residency and for restoring eligibility to legal non-citizen children both have a moderate degree of uncertainty. The primary source of uncertainty for the first provision is the percent of legal residents who meet the five-year residency test, since the QC data does not contain that information, and we have to impute it from other data sources. This issue also affects the estimate for children, since children meeting the five-year residency would become eligible under the five-year residency provision (which was implemented earlier) rather than the child provision. The other source of uncertainty, which applies to both groups, is the take-up rate among this group. The estimate for restoring eligibility to disabled people has a higher degree of uncertainty because data is based on a study of only eight States.

## Regulatory Flexibility Act

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 (5 U.S.C. 601–612). Eric M. Bost, the Under Secretary for Food, Nutrition and Consumer Services, has certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. State and local human services agencies will be the most affected to the extent that they administer the Food Stamp Program.

## Public Law 104–4

Title II of the Unfunded Mandate Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under Section 202 of the UMRA, FNS generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with “Federal mandates” that may result in expenditures to State, local, or tribal governments in the aggregate, or to the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires FNS to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule. This rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, and tribal governments or the private sector of \$100 million or more in any one year. This rule is, therefore, not subject to the requirements of sections 202 and 205 of the UMRA.

## Executive Order 12372

The Food Stamp Program is listed in the Catalog of Federal Domestic Assistance under No. 10.551. For the reasons set forth in the final rule in 7 CFR part 3015, Subpart V and related Notice (48 FR 29115), this program is excluded from the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

## Executive Order 13132, Federalism

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three

categories called for under section (6)(b)(2)(B) of Executive Order 13132.

#### **Prior Consultation With State Officials**

Prior to drafting this proposed rule, we consulted with State and local agencies at various times. Because the Food Stamp Program is a State-administered, Federally-funded program, our regional offices have formal and informal discussions with State and local officials on an ongoing basis regarding program implementation and policy issues. This arrangement allows State and local agencies to provide comments that form the basis for many discretionary decisions in this and other Food Stamp rules. In addition, we held three conferences with representatives of the State agencies specifically to discuss the provisions of FSRIA being implemented through this rule. Dates and locations of the meetings were as follows: June 11, 2002, in Alexandria, Virginia; June 13–14, 2002, in Kennebunkport, Maine; and June 17–19, 2002, in Dallas, Texas. We have also received written requests for policy guidance on the implications of FSRIA from the State agencies that deliver food stamp services. These questions have helped us make the rule responsive to concerns presented by State agencies.

#### **Nature of Concerns and the Need To Issue This Rule**

This rule implements changes required by the FSRIA. There are no purely discretionary provisions contained in this rule. State agencies generally want simplification of program eligibility and certification requirements. The proposed rule provides simplification by implementing statutory options which, among other things, reduce household reporting requirements, simplify the definition of income, and simplify the determination of deductions. Specific policy questions raised by State agencies after enactment of FSRIA, but prior to the promulgation of regulations, helped us identify issues that needed to be clarified in the proposed rule.

#### **Extent to Which We Meet Those Concerns**

FNS has considered the impact of the proposed rule on State and local agencies. This rule makes changes that are required by law. All of the provisions of FSRIA addressed in this rule, except Section 4401, were effective on October 1, 2002. Section 4401 has 3 different implementation dates. The provision restoring food stamp eligibility to qualified aliens who are otherwise eligible and who are receiving

disability benefits regardless of date of entry was effective on October 1, 2002. The provision restoring food stamp eligibility to qualified aliens who are otherwise eligible and who have lived in the United States for 5 years as qualified aliens beginning on date of entry was effective April 1, 2003. The provision restoring food stamp eligibility to qualified aliens who are otherwise eligible and who are under 18 regardless of date of entry and the provision eliminating the sponsor deeming requirements for immigrant children are both effective October 1, 2003.

Some of the provisions of this rule are mandatory, but the effects of the mandatory provisions on State agencies are minimal. The rule changes the method used to calculate the program's standard deduction, but this change has had minimal effect on State agencies. To implement the provision, State agencies reprogrammed their computer systems to assign standard deduction amounts by household size and must update these amounts annually. FNS will annually calculate the deduction amounts and share them with States. The rule requires State agencies that maintain a Web site to make their State food stamp application available on that Web site in each language in which the State agency makes a printed application available. In posting applications on their Web pages, State agencies must comply with Section 504 of the Rehabilitation Act of 1973, Pub. L. 93–112, as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93–516, 29 U.S.C. 794, which requires State agencies to make their Web sites accessible to people with disabilities. However, since many States have already adopted standards that comply with the requirements of Section 504, they should not incur additional costs to put their food stamp application forms on their Web sites. The rule also restores food stamp eligibility to certain qualified aliens and eliminates the sponsor deeming requirements for immigrant children. The remaining provisions of this rule are optional and provide State agencies the flexibility to simplify some program eligibility and certification requirements.

In the proposed rule, we have addressed questions submitted by State agencies regarding the provisions of FSRIA implemented in this rule. FNS is not aware of any case where the discretionary provisions of the rule would preempt State law. FNS has attempted to write this regulation to provide States with maximum flexibility in implementing the provisions.

#### **Executive Order 12988**

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full implementation. This rule is not intended to have retroactive effect unless so specified in the Effective Date paragraph of the final rule. Prior to any judicial challenge to the provisions of this rule or the application of its provisions, all applicable administrative procedures must be exhausted. In the Food Stamp Program, the administrative procedures are as follows: (1) For Program benefit recipients—State administrative procedures issued pursuant to 7 U.S.C. 2020(e)(1) of the Food Stamp Act and regulations at 7 CFR 273.15; (2) for State agencies—administrative procedures issued pursuant to 7 U.S.C. 2023 of the Food Stamp Act and regulations at 7 CFR 276.7 (for rules related to non-quality control (QC) liabilities) or 7 CFR Part 283 (for rules related to QC liabilities); (3) for Program retailers and wholesalers—administrative procedures issued pursuant to Section 14 of the Food Stamp Act (7 U.S.C. 2023) and 7 CFR 278.8.

#### **Civil Rights Impact Analysis**

FNS has reviewed this proposed rule in accordance with the Department Regulation 4300–4, “Civil Rights Impact Analysis,” to identify and address any major civil rights impacts the rule might have on minorities, women, and persons with disabilities. After a careful review of the rule's intent and provisions, and the characteristics of food stamp households and individual participants, FNS has determined that there is no adverse effect on any of the protected classes. FNS has no discretion in implementing many of these changes. The changes required to be implemented by law have been implemented.

In general, all data available to FNS indicate that protected individuals have the same opportunity to participate in the Food Stamp Program as non-protected individuals. FNS specifically prohibits the State and local government agencies that administer the Food Stamp Program from engaging in actions that discriminate based on race, color, national origin, sex, religion, age, disability, marital or family status. Regulations at 7 CFR 272.6 specifically state that “State agencies shall not discriminate against any applicant or participant in any aspect of program

administration, including, but not limited to, the certification of households, the issuance of coupons, the conduct of fair hearings, or the conduct of any other program service for reasons of age, race, color, sex, handicap, religious creed, national origin, or political beliefs.

Discrimination in any aspect of program administration is prohibited by these regulations, the Food Stamp Act of 1977 (the Act), the Age Discrimination Act of 1975 (Pub. L. 94-135), the Rehabilitation Act of 1973 (Pub. L. 93-112, section 504), and title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d). Enforcement action may be brought under any applicable Federal law. Title VI complaints shall be processed in accord with 7 CFR part 15. Where State agencies have options, and they choose to implement a certain provision, they must implement it in such a way that it complies with the regulations at 7 CFR 272.6.

#### **Paperwork Reduction Act**

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), this proposed rule contains information collections that are subject to review and approval by the Office of Management and Budget; therefore, FNS is submitting for public comment the changes in the information collection burden that would result from adoption of the proposals in the rule. The information collections affected by this rule are (1) OMB Number 0584-0064: Application and Certification of Food Stamp Households; (2) OMB Number 0584-0496: State Agency Options; and (3) OMB Number 0584-0083: Operating Guidelines, Forms and Waivers.

Comments on this information collection must be received by June 15, 2004.

Send comments to Office of Information and Regulatory Affairs, OMB, Attention: Katherine Astrich, Desk Officer for FNS, Washington, DC, 20503. Comments may be e-mailed to Ms. Astrich at [KAstrich@omb.eop.gov](mailto:KAstrich@omb.eop.gov). Please also send a copy of your comments to Matthew Crispino, Program Analyst, Certification Policy Branch, Program Development Division, Food and Nutrition Service, USDA, 3101 Park Center Drive, Room 800, Alexandria, Virginia 22302, (703) 305-2407, or by fax to (703) 305-2486, or by e-mail at [fsphq-web@fns.usda.gov](mailto:fsphq-web@fns.usda.gov). For further information, or for copies of the information collection, please contact Mr. Crispino at the above address.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the performance of the functions of the agency, including

whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

#### **Request 1**

*Title:* Application and Certification of Food Stamp Households.

*OMB Number:* 0584-0064.

*Expiration Date:* January 31, 2006.

*Type of Request:* Revision of a currently approved collection.

*Abstract:* Title 7, Part 273 of the Code of Federal Regulations (CFR) sets forth the Food Stamp Program requirements for the application, certification and continued eligibility for food stamp benefits. This rulemaking revises the collection burden to account for changes required by FSRIA.

*Food Stamp applications on State Web sites.* FSRIA requires every State agency that maintains a Web site to make its food stamp application available on the Web site in each language that a printed copy is available. State agencies are not required to accept applications on-line.

*State agency burden:* Because States already have to develop applications, and all States already maintain Web sites, we anticipate that States will only incur a start-up burden to post their applications on the Web.

*Household burden:* This requirement provides another manner in which households are able to obtain an application. There would be no additional burden for households.

*Start-up burden:* We estimate a start-up burden for the requirement that State agencies place their food stamp applications on their Web sites in each language that paper applications are made available. We estimate a burden of 1.5 hours for a State agency to post its application(s) on the Web. States are required to have their applications posted by November 13, 2003. We estimate a total burden of 80 hours (53 State agencies  $\times$  1.5 hours = 80 hours).

*Determination of child support payments.* Households that pay legally owed child support are eligible for

either an exclusion or deduction of those payments. FSRIA allows State agencies to rely solely on information from the State's Child Support Enforcement (CSE) agency in determining a household's obligation and actual child support payments. The household would not have further reporting and verification requirements.

*State agency burden:* This provision was intended as a simplification for States to rely solely on information from the Child Support Enforcement (CSE) agency in determining the amount of child support payments made. While the State agency will use CSE data, it will not have to perform other verification activities for payments reported by the household. We expect that most States already have a link with the CSE agency. Therefore, there would be no additional burden to set up an interface with the CSE agency. However, we estimate that modifying instructions to workers regarding the new process to determine child support payments will result in a burden of 20 hours per State agency. We anticipate five State agencies in each of the next three years will choose this option, resulting in a total of 100 burden hours annually (5 States  $\times$  20 hours = 100 hours).

*Household burden:* This provision may reduce the reporting burden for households, because the State agency will rely on the information from the CSE agency instead of requiring additional verification from the household. We estimate that households spend an average of 19 minutes completing an application for initial certification or recertification. Given that only one percent of households received this deduction in fiscal year 2001 (and even fewer will be subject to the new requirement since it is a State option), the average time to complete an application will not be measurably affected. Therefore, we do not estimate a change in household burden from this provision.

*Notification on reporting forms if State chooses to disregard changes in deductions.* States are given the option in FSRIA to postpone acting on changes that would change the amount of deductions, except for changes in shelter expenses due to a change in residence and changes in earned income. If the State chooses this option, it must include a notice on all report forms that any reported changes that affect deductions will not be acted on until the household's next recertification.

*State agency burden:* The notification would be added to a State's existing reporting forms, so this option would not impose an additional burden for

creating or sending a new notice. However, States that choose this option would have to revise their reporting forms to include notification about postponing changes in deductions. We estimate that modifying existing report forms will result in a burden of 20 hours per State agency. We anticipate five States in each of the next three years will choose this option, creating a burden of 100 hours annually ( $5 \text{ States} \times 20 \text{ hours} = 100 \text{ hours}$ ).

*Household burden:* FNS believes there is no burden to the household for this provision.

*Transition notice.* FSRIA added an option for States to provide transitional benefits to families leaving the Temporary Assistance for Needy Families (TANF) program. This addition changed the transitional benefit alternative provided through the regulations under the final rule on Noncitizen Eligibility and Certification Provisions of Pub. L. 104–193, as Amended by Public Laws 104–208, 105–33 and 105–185 (NCEP) (65 FR 70134 (November 21, 2000)). The proposed rule includes new requirements for the Transition Notice that States must provide to households receiving transitional benefits.

Families leaving TANF receive a “Transition Notice” (TN) from the State agency advising the household that it will be receiving transitional benefits and the length of the transitional period. The TN must inform the household that it has the option to apply for recertification at any time during the transitional period; otherwise at the end of the transitional period, the household’s circumstances will be reevaluated or the household will have to be recertified. The notice must also explain any changes in the household’s benefit, and inform the household that if it returns to TANF during the period, the State agency will reevaluate the household’s circumstances or require the household to undergo a recertification. Finally, the TN must inform the household that it does not have to report changes during the transitional period. If the State agency opts not to act on changes during the transitional period, the TN must tell households that if they experience a change that would increase benefits, the household should apply for recertification.

*State agency burden:* Since there is no difference in how the Notice of Expiration (NOE) and the Transition Notice (TN) are handled, and the TN will replace the NOE in some cases, the burden for the TN will be considered minimal and therefore will be incorporated into the NOE burden

calculations. We do anticipate a burden of 20 hours per State agency for developing the TN. This burden would include the States that currently provide transitional benefits, because the proposed rule would require substantial changes to the current TN. We anticipate 5 State agencies will choose to implement the option in each of the next three years, therefore creating a burden of 100 hours each year ( $5 \times 20 \text{ hours} = 100 \text{ hours}$ ).

*Household burden:* FNS believes there is no burden to the household for this provision.

*Simplified reporting option.* Since the NECP rule, State agencies have had the option to require households with earnings to submit reports of their circumstances every six months. In addition, a household must report when its gross income exceeds 130 percent of the poverty threshold. FSRIA extends this option to most households (a few categories of households are prohibited by law from being required to submit periodic reports). This change means more households will only have to submit one report every six months, as opposed to reporting every month, quarter, or whenever their circumstances change. The State agency would also have fewer reports to process, although we estimate that processing the semi-annual report is more time consuming than processing a change report. States may have fewer recertifications to process if they extend the certification period for households in semi-annual reporting. Processing the six-month report is less time consuming than processing a complete recertification.

*State agency burden:* Implementing simplified reporting reduces a State’s burden in processing reports. Simplified reporting typically requires a household to report once every six months, and also when the household’s gross income exceeds 130 percent of the poverty level (the gross income threshold). This means that States choosing this option will have fewer household reports to process.

The NECP rule provided an option to provide simplified reporting to households with earnings. The proposed rule allows States to extend simplified reporting to most households, with an option to require reports once every four to six months. Based on a recent survey of State choices, we estimate that 1,703,806 households will be newly subject to the expanded simplified reporting option. Of these households, we assume 114,859 would otherwise have been subject to quarterly reporting, and 1,588,947 would have been subject to

change reporting requirements. Under simplified reporting, all of these households will have to submit one report annually (these households will have to submit an application for recertification at least once every 12 months), and we estimate the State agency will spend 19 minutes processing each report for a total of 539,539 burden hours ( $1,703,806 \text{ reports} \times 19 \text{ minutes}/60 \text{ minutes per hour} = 539,539 \text{ hours}$ ). Quarterly reporting households submit 3 reports annually and we estimate change reporting households submit an average of 3.5 reports annually. We estimate the State agency spends 19 minutes processing each quarterly report and 5 minutes processing each change report. So if these simplified reporting households were instead subject to change or quarterly reporting, the State agency would have a total burden of 572,559 hours [ $(114,859 \text{ quarterly reporting households} \times 3 \text{ reports} \times 19 \text{ minutes}/60 \text{ minutes per hour} = 109,116 \text{ hours}) + (1,588,947 \text{ change reporting households} \times 3.5 \text{ reports} \times 5 \text{ minutes}/60 \text{ minutes per hour} = 463,443 \text{ hours}) = 572,559 \text{ hours}$ ]. This results in a net savings of 33,020 burden hours ( $539,539 \text{ hours} - 572,559 \text{ hours} = -33,020 \text{ hours}$ ) for implementing the expanded simplified reporting option in the proposed rule.

*Household burden:* This provision will also reduce the burden on households, since certain households in States that choose this option will have fewer reports to file with the food stamp agency. As noted above, we estimate 1,703,806 households will be subject to simplified reporting due to the proposed rule. We estimate that households will spend 7 minutes completing a semi-annual or quarterly report and 5 minutes completing a change report. Households subject to the new semi-annual report will have a burden of 198,777 hours ( $1,703,806 \text{ reports} \times 7 \text{ minutes}/60 \text{ minutes per hour} = 198,777 \text{ hours}$ ). We estimate these households would have a total burden of 503,644 hours under quarterly or change reporting [ $(114,859 \text{ quarterly reporting households} \times 3 \text{ reports} \times 7 \text{ minutes}/60 \text{ minutes per hour} = 40,201 \text{ hours}) + (1,588,947 \text{ change reporting households} \times 3.5 \text{ reports} \times 5 \text{ minutes}/60 \text{ minutes per hour} = 463,443 \text{ hours}) = 503,644 \text{ hours}$ ]. This results in a net savings of 304,866 burden hours ( $198,777 \text{ hours} - 503,644 \text{ hours} = -304,866 \text{ hours}$ ).

*Record keeping burden only:* Local agencies are required to maintain client case records for three years and to perform duplicate participation checks on individual household members to ensure the member is not participating in more than one household.

Data are not available on the actual number of local food stamp offices in each State or the actual number of workers (recordkeepers) that would be maintaining case files and performing duplicate participation checks. For the purpose of this burden package, we are using the number of food stamp project areas, which equals 2,715.

(A) *Case Files*: The caseload to be maintained is equal to the number of participating households and their subsequent files. The number of times recordkeepers must access these case files is equal to the number of documents expected to be filed or noted in the file annually. We anticipate minimal filing to involve a burden of 2 minutes per document. Including documentation (*i.e.* electronic files, caseworker written entry into the file, or hard copies of the document) for notices which were sent to the household and when, we anticipate a total of 109,883,314 documents/year. Annual record keeping burden associated with

creating, filing, and maintaining household case files is estimated to be 3,662,777 burden hours ( $109,883,314 \times 2/60 = 3,662,777$ ).

This represents a decline in burden hours from the previous submission (113,319,113 records and 3,777,303 burden hours). Although the base assumptions of the number of applicants and recipients are higher than the previous submission, we were double counting records of the Notice of Expiration (NOE) and the Transition Notice (TN). As noted above, the TN will replace the NOE for certain households. However, our previous spreadsheet had an NOE and a TN for each household, resulting in an additional 243,015 burden hours.

(B) *Monitoring Duplicate Participation*: The estimated annual record keeping burden for maintaining this system that is automated by most States is based on the number of total applications (all approved and denied initial and recertification applications) expected to be received (20,556,015)

and the average number of persons (2.3) in each applicant household. Assuming that at least 80 percent of the applications will be subject to this check, the estimated number of duplicate participation checks (responses) that must be performed by State agencies is 37,823,068. Burden is estimated to be 15 seconds (or 0.00416666 hour) per response, for a total burden of 157,596 burden hours annually ( $20,556,015 \times 2.3 \times .80 \times .25/60$ ). This is an increase of 6,498 burden hours from our previous submission of 151,098 burden hours.

(C) Total record keeping burden would be 3,820,373 hours. Burden per recordkeeper would be 1,407 hours.

Summary of burden hours for public—state and local governments, potential applicants, and current participants:

*Respondents*: 20,556,015.

*Annual responses*: 157,216,781.

*Total burden hours*: 29,994,434.

**BILLING CODE 3410-30-P**

## Reporting Burden

| <b>ANNUALIZED BURDEN</b>                        | <b>Activity</b>                                | <b>Current Total Hours</b> | <b>Proposed Total Hours</b> |
|---|--|----------------------------|-----------------------------|
| <b>Household Members</b>                        | Initial application data collection            | 2,577,595                  | 2,874,030                   |
|   | Recertification data collection                | 3,164,141                  | 3,635,375                   |
|   | Monthly reports data collection                | 901,549                    | 853,806                     |
|   | Quarterly reports data collection              | 910,308                    | 260,860                     |
|   | Semi-annual reports data collection            | 0                          | 241,887                     |
|   | Change reports data collection                 | 556,450                    | 357,203                     |
|   | Response to notice of missed interview         | 302,197                    | 342,600                     |
|   | Response to determination of indigence         | 0                          | 0                           |
|   | Response to face-to-face waiver                | 0                          | 0                           |
|   | Notification that TANF does not apply          | 0                          | 0                           |
|   | Transitional Notice (TN)                       | 0                          | 0                           |
|   | Response to request for contact (RFC)          | 158,986                    | 102,058                     |
|   | <b>SUBTOTAL</b>                                | <b>8,110,044</b>           | <b>8,667,819</b>            |
| <b>State agency Clerks or Eligibility Staff</b> | Initial application processing                 | 4,883,864                  | 5,445,531                   |
|   | Recertification application processing         | 5,995,215                  | 6,888,076                   |
|   | Monthly reports processing                     | 2,447,063                  | 2,317,472                   |
|   | Quarterly reports processing                   | 2,470,837                  | 708,051                     |
|   | Semi-annual reports processing                 | 0                          | 656,550                     |
|   | Change reports processing                      | 556,450                    | 357,203                     |
|   | Notice of eligibility, denial or pending       | 604,393                    | 685,201                     |
|   | Notice of late/incomplete monthly reports      | 1,171                      | 1,109                       |
|   | Adequate notice to monthly reporters           | 7,025                      | 6,653                       |
|   | Notice of adverse action (NOAA)                | 31,797                     | 20,412                      |
|   | Notice of expiration (NOE)                     | 243,015                    | 273,182                     |
|   | Request for Contact (RFC)                      | 31,797                     | 20,412                      |
|   | Transitional Notice (TN)                       | 0                          | 100                         |
|   | Notice of Missed Interview (NOMI)              | 5,037                      | 5,710                       |
|   | Determination of indigence                     | 83                         | 100                         |
|   | Notification of waiving face-to-face           | 50,366                     | 57,100                      |
|   | Notification that TANF does not apply          | 50,366                     | 57,100                      |
|   | State responsibility for misfiled applications | 6,000                      | 6,000                       |
|   | State applications on website                  | 0                          | 80                          |
|   | Determining child support payments             | 0                          | 100                         |
|   | Notice about deduction freeze                  | 0                          | 100                         |
|   | <b>Subtotal</b>                                | <b>17,384,480</b>          | <b>17,506,242</b>           |
|   | <b>TOTAL REPORTING BURDEN</b>                  | <b>25,494,524</b>          | <b>26,174,061</b>           |

## Recordkeeping Burden:

| <b>ANNUALIZED BURDEN</b> | <b>Activity</b>                   | <b>Current Total Hours</b> | <b>Proposed Total Hours</b> |
|--------------------------|-----------------------------------|----------------------------|-----------------------------|
|                          | Maintaining case files            | 3,777,304                  | 3,662,777                   |
|                          | Monitoring duplication            | 151,098                    | 157,596                     |
|                          | <b>TOTAL RECORDKEEPING BURDEN</b> | <b>3,928,402</b>           | <b>3,820,373</b>            |

## Total Burden:

| <b>ANNUALIZED BURDEN</b> | <b>Activity</b>           | <b>Current Total Hours</b> | <b>Proposed Total Hours</b> |
|--------------------------|---------------------------|----------------------------|-----------------------------|
|                          | Reporting Burden          | 25,494,524                 | 26,174,061                  |
|                          | Recordkeeping Burden      | 3,928,402                  | 3,820,373                   |
|                          | <b>TOTAL BURDEN HOURS</b> | <b>29,422,927</b>          | <b>29,994,434</b>           |

*Request 2*

*Title:* State Agency Options.

*OMB Number:* 0584-0496.

*Expiration Date:* September 30, 2004.

*Type of Request:* Revision of a currently approved collection.

*Abstract:* Title 7, Part 273 of the Code of Federal Regulations (CFR) sets forth the Food Stamp Program requirements for the application, certification and continued eligibility for food stamp benefits. This rulemaking revises the collection burden to account for changes required by FSRIA.

*Homeless shelter estimate.* Section 273.9(d)(6)(i) of the regulations, as proposed to be amended, allows State agencies to use a homeless shelter deduction. State agencies will no longer need to collect information on shelter costs for homeless households. The previous version of the regulation allowed State agencies to use a homeless shelter deduction of up to \$143 a month. FSRIA requires that State agencies choosing to use the homeless shelter deduction must set the deduction at \$143 monthly.

*Estimates of burden:* The previous burden package estimated 1 hour per year for States that had chosen this option to conduct periodic reviews. Because the deduction is now set at a standard \$143, there will be no burden for States that choose this option. This represents a change of 20 hours per year from what we anticipated in the previous information collection burden (ICB) calculations.

*Establishing and reviewing standard utility allowances.* Section 273.9(d)(6)(iii)(B) of the regulations allows State agencies to establish standard utility allowances (SUA) and once established requires State agencies to review and adjust SUAs annually to reflect changes in the cost of utilities. Many State agencies already have one or more approved standards, which they update annually. State agencies may use information already available from case files, quality control reviews or other sources and from utility companies. State agencies may make adjustments based on cost-of-living increases. The information will be used to establish standards to be used in place of actual utility costs in the computation of the excess shelter deduction. State agencies are required to submit the amounts of these standards and methodologies used

in developing and updating the standards to FNS when they are developed or changed.

*Estimates of burden:* Currently 52 State agencies have a standard that includes heating or cooling costs and 31 have a standard for utility costs other than heating or cooling. In addition, 44 State agencies have a telephone allowance standard. State agencies are required to review the standards yearly to determine if increases are needed due to the cost of living. We estimate a minimum of 2.5 hours annually to make this review and adjustment (2.5 hours  $\times$  52 State agencies = 130 hours). Total burden for this provision is estimated to be 130 hours per year.

*Mandatory utility standards.* Section 273.9(d)(6)(iii) of the regulations, as proposed to be amended, allows State agencies to mandate use of standard utility allowances when the excess shelter cost deduction is computed instead of allowing households to claim actual utility costs provided the standards will not increase program costs. State agencies may establish additional standards to implement this provision. They must show that mandatory utility standards will not increase program costs. Request for FNS approval to use a standard for a single utility must include the cost figures upon which the standard is based. If the State wants to mandate use of utility standards but does not want individual standards for each utility, the State needs to submit information showing the approximate number of food stamp households that would be entitled to the nonheating and noncooling standard and the average cost of their actual utility costs now plus the standards that State proposes to use and an explanation of how they were computed. If the State does not have actual data, it will need to pull a sample of cases to obtain it.

*Estimates of burden:* Currently, nineteen (19) State agencies selected to mandate the use of standard utility allowances. We do expect that additional states will decide to implement a mandatory SUA. There is not an additional burden in developing the standards since these agencies already calculate the standard utility allowance. Therefore, since there is no additional burden, the total annual burden associated with mandatory utility standards is zero.

*Self-employment costs.* Section 273.11(b) of the regulations allows self-employment gross income to be reduced by the cost of producing such income. The regulations allow the State agencies, with approval from FNS, to establish the methodology for offsetting the costs of producing self-employment income, as long as the procedure does not increase Program costs. State agencies may submit a request to FNS to use a method of producing a reasonable estimate of the costs of producing self-employment income in lieu of calculating the actual costs for each household with such income. Different methods may be proposed for different types of self-employment. The proposal shall include a description of the proposed method, the number and type of households and percent of the caseload affected, and documentation indicating that the proposed procedure will not increase program costs. State agencies may collect this data from household case records or other sources that may be available.

*Estimates of burden:* We estimate that 10 State agencies will submit a request of this type each year for the next three years. It is estimated that these States will incur a one-time burden of at least 10 working hours gathering and analyzing data, developing the methodology, determining the cost implication, and submitting a request to FNS for a total burden of 100 hours annually. State agencies are not required to periodically review their approved methodologies. We do not anticipate that State agencies will voluntarily review their methodologies for change on a regular basis, thus burden is not being assessed for this purpose at this time.

*Record keeping burden only:* Each State agency would be required to keep a record of the information gathered and submitted to FNS. We estimate this to be 7 minutes per year for the 53 State agencies to equal a total of 6 burden hours annually. (53  $\times$  7 minutes/60 minutes per hour = 6 hours annual burden)

Summary of burden hours for public—state and local governments, potential applicants, and current participants:

*Respondents:* 53.

*Annual responses:* 115.

*Total burden hours:* 236.

## Reporting Burden:

| ANNUALIZED BURDEN | Activity                        | Current Total Hours | Proposed Total Hours |
|-------------------|---------------------------------|---------------------|----------------------|
| State Agency      | Homeless shelter estimate       | 20                  | 0                    |
|                   | Establishing and reviewing SUAs | 130                 | 130                  |
|                   | Mandatory SUAs                  | 0                   | 0                    |
|                   | Self-employment costs           | 100                 | 100                  |
|                   | <b>TOTAL REPORTING BURDEN</b>   | <b>250</b>          | <b>230</b>           |

## Recordkeeping Burden:

| ANNUALIZED BURDEN | Activity                          | Current Total Hours | Proposed Total Hours |
|-------------------|-----------------------------------|---------------------|----------------------|
|                   | <b>TOTAL RECORDKEEPING BURDEN</b> | <b>6</b>            | <b>6</b>             |

## Total Burden:

| ANNUALIZED BURDEN | Activity                  | Current Total Hours | Proposed Total Hours |
|-------------------|---------------------------|---------------------|----------------------|
|                   | Reporting Burden          | 250                 | 230                  |
|                   | Recordkeeping Burden      | 6                   | 6                    |
|                   | <b>TOTAL BURDEN HOURS</b> | <b>256</b>          | <b>236</b>           |

## Request 3

*Title:* Operating Guidelines, Forms and Waivers.

*OMB Number:* 0584-0083.

*Expiration Date:* September 2004.

*Type of Request:* Revision of a currently approved collection.

*Abstract:* The regulations at 7 CFR 272.2 require that State agencies plan and budget program operations and establish objectives for each year. State agencies submit these plans to the regional offices for review and approval. This rulemaking is proposing to amend 7 CFR 272.2(d) of the Food Stamp Program Regulations to require State agencies that opt to implement certain provisions of FSRIA to include these options in the State Plan of Operation. The optional provisions that must be included in the State Plan of Operation are: simplified definition of resources, simplified definition of income,

optional child support deduction, homeless household shelter deduction, simplified reporting, simplified determination of deductions, and transitional benefits. The regulations at 7 CFR 272.2(f) require that State agencies only have to provide FNS with changes to these plans as they occur. Since these options are newly provided for by FSRIA, State agencies that choose these options must include them in their State Plan of Operations this year, and any subsequent year only if there are changes.

*Estimates of burden:* 35 States have adopted simplified reporting; 10 states have adopted transitional benefits; 22 States have adopted simplified definition of income; 19 States have adopted simplified definition of resources; 25 States have adopted the homeless household deduction; 4 States have adopted the option to simplify

determination of deductions; and 6 states have chosen to treat legally obligated child support payments made to non-household members as an income exclusion while the remaining 47 States will continue to count the payments as a deduction. We estimate an average burden of one response per State agency per option selected over three years. The additional public reporting burden for this proposed collection of information is estimated to average an additional .25 hours per response. The total burden for this proposed collection is 42 hours.

Summary of burden hours for public—state and local governments, potential applicants, and current participants:

*Respondents:* 53.

*Annual responses:* 168.

*Total burden hours:* 42.

## Reporting Burden:

| ANNUALIZED BURDEN | Activity                      | Current Total Hours | Proposed Total Hours |
|-------------------|-------------------------------|---------------------|----------------------|
| State Agency      | State Plan Amendments         | 8.5                 | 50.5                 |
|                   | <b>TOTAL REPORTING BURDEN</b> | <b>8.5</b>          | <b>50.5</b>          |

## Government Paperwork Elimination Act

FNS is committed to compliance with the Government Paperwork Elimination Act, which requires government agencies to provide the public the option of submitting or transmitting

business electronically to the maximum extent possible.

## Background

The Farm Security and Rural Investment Act of 2002 (FSRIA), Public Law 107-171, approved on May 13,

2002, amended the Food Stamp Act of 1977, 7 U.S.C. 2011, *et seq.* (the Act), by establishing new eligibility and certification requirements for the receipt of food stamps. This rulemaking addresses 11 sections of FSRIA. State agencies were required to implement

most of these provisions on October 1, 2002. The requirements of each provision are discussed below.

#### **Availability of Food Stamp Program Applications on the Internet—7 CFR 273.2(c)**

Section 11(e)(2)(B)(ii) of the Act (7 U.S.C. 2020(e)(2)(B)(ii)) requires State agencies to develop a food stamp program application. Section 4114 of FSRIA amends Section 11(e)(2)(b)(ii) to require that State agencies which maintain a web site make their State food stamp application available on that web site in each language in which the State agency makes a printed application available. The Department is proposing to amend current regulations at 7 CFR 273.2(c)(3) to implement this provision.

The Department believes that the purpose of this provision is to allow households to obtain a food stamp application without having to visit or contact their local food stamp office. Thus, the application posted on the web page must be a complete application; *i.e.*, it must be the same application that the household would receive if it picked up the application at the local office or had the application mailed to it. The State agency must provide on the web page the addresses and phone numbers of all State food stamp offices and a statement that the household should return the application form to its nearest local office. Section 4114 does not require that State agencies accept applications through the Internet, only that applications be made available online.

State agencies should format the application appearing on the web page so that the household can easily print and complete the application. In addition, in posting food stamp applications on their web pages, State agencies must comply with Section 504 of the Rehabilitation Act of 1973, Pub. L. 93–112, as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93–516, 29 U.S.C. 794. Section 504 eliminates discrimination on the basis of handicap in any program or activity receiving Federal financial assistance. To be in compliance with Section 504, State agencies must make their food stamp websites accessible to persons with disabilities. The Conference Report accompanying FSRIA, H.R. Conf. Rep. No. 107–424, at 541 (2002) (the Conference Report), refers to Section 504, noting that compliance with it requires that State agencies ensure that documents on a State's web page are in a format in which browsers for the visually impaired can read them, and that they

can be converted to Braille documents; that graphic elements that convey meaning have text explanations available; and that English language text is also available in other languages, as appropriate. The Conference Report also notes that because many States have already adopted standards that comply with the requirements of Section 504, the requirement to comply with Section 504 when putting applications on their web sites should not impose additional costs on them. The Department is proposing to include a reference to Section 504 of the Rehabilitation Act in revised 7 CFR 273.2(c)(3).

#### **Partial Restoration of Benefits to Legal Immigrants—7 CFR 273.4**

##### *1. Expanded Eligibility for Certain Noncitizens.*

Section 4401 of FSRIA substantially expands eligibility for the Food Stamp Program for legal immigrants. Prior to the enactment of Section 4401, Section 402 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), as amended, limited eligibility for food stamps to United States citizens, non-citizen nationals, and certain alien groups. The requirements of Section 402 of PRWORA, as well as the alien eligibility requirements contained in Section 6(f) of the Act (7 U.S.C. 2015(f)), were implemented through current regulations at 7 CFR 273.4(a). Under those rules, the following groups are eligible for food stamps:

- United States citizens and non-citizen nationals (as defined in the DOJ Interim Guidance published November 17, 1997 (62 FR 61344));
- Certain Hmong or Highland Laotians and their spouses and children;
- American Indians born in Canada to whom Section 289 of the Immigration and Nationality Act (INA) (8 U.S.C. 1359) applies; and
- Members of Indian tribes as defined in section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e)).

In addition to the above-mentioned groups, other non-citizens may be eligible for food stamps if they satisfy two requirements. First, the individual must be a qualified alien as defined at 7 CFR 273.4(a)(5)(i).

*Under that section, a qualified alien is:*

- An alien who is lawfully admitted for permanent residence under the INA;
- An alien who is granted asylum under section 208 of the INA;
- A refugee who is admitted to the United States under section 207 of the INA;

- An alien who is paroled into the United States under section 212(d)(5) of the INA for a period of at least 1 year;

- An alien whose deportation is being withheld under section 243(h) of the INA as in effect prior to April 1, 1997, or whose removal is withheld under section 241(b)(3) of the INA;

- An alien who is granted conditional entry pursuant to section 203(a)(7) of the INA as in effect prior to April 1, 1980;

- An alien who has been battered or subjected to extreme cruelty in the United States by a spouse or a parent or by a member of the spouse or parent's family residing in the same household as the alien at the time of the abuse, an alien whose child has been battered or subjected to battery or cruelty, or an alien child whose parent has been battered; or

- An alien who is a Cuban or Haitian entrant, as defined in section 501(e) of the Refugee Education Assistance Act of 1980.

Second, pursuant to PRWORA, in addition to being a qualified alien under 7 CFR 273.4(a)(5)(i), the individual must meet at least one of the criteria specified at 7 CFR 273.4(a)(5)(ii). Some of the criteria specified at 7 CFR 273.4(a)(5)(ii) make a noncitizen eligible for the Food Stamp Program for only 7 years, while other criteria make the noncitizen permanently eligible for the program. A qualified alien who meets one of the following criteria specified at 7 CFR 273.4(a)(5)(ii)(B) through (a)(5)(ii)(F) is eligible to participate in the Food Stamp Program for 7 years after receiving admitted or granted status:

- An alien admitted as a refugee under section 207 of the INA.

- An alien granted asylum under section 208 of the INA.

- An alien whose deportation is withheld under section 243(h) of the INA as in effect prior to April 1, 1997, or whose removal is withheld under section 241(b)(3) or the INA.

- An alien granted status as a Cuban or Haitian entrant (as defined in section 501(e) of the Refugee Education Assistance Act of 1980).

- An Amerasian admitted pursuant to section 584 of Public Law 100–202, as amended by Public Law 100–461.

A qualified alien who meets one of the following criteria specified at 7 CFR 273.4(a)(5)(ii)(A) and (a)(5)(ii)(G) through (a)(5)(ii)(J) is permanently eligible to participate in the Food Stamp Program:

- An alien lawfully admitted for permanent residence under the INA who has 40 qualifying quarters of work under Title II of the Social Security Act;

- An alien (or spouse or unmarried dependent child of an alien) with certain military connections;
- An alien who was lawfully residing in the United States on August 22, 1996 and is now receiving benefits or assistance for blindness or disability, as defined in 7 CFR 271.2;
- An alien who was lawfully residing in the United States on August 22, 1996 and was 65 years or older on or before that date;
- An alien who was lawfully residing in the United States on August 22, 1996 and is now under 18 years of age.

Section 4401 of FSRIA amended Section 402 of PRWORA to expand food stamp eligibility for certain additional qualified aliens. First, Section 4401 extends eligibility for food stamps to any qualified alien who has resided in the United States for 5 years or more as a qualified alien. The law specifically provides eligibility to "any qualified alien who has resided in the United States with a status within the meaning of the term 'qualified alien' for a period of 5 years or more beginning on the date of the alien's entry into the United States." The Department interprets this provision to require that, to be eligible to participate in the Food Stamp Program, the alien must have been in a qualified alien status, as defined under PRWORA, for 5 years. Section 4401 could be read to require that the alien have been in a qualified status at the time he or she entered the United States in order to be eligible under this provision. However, the Department believes that such a reading of the law is too restrictive as it would deny the benefits of the provision to aliens who are not qualified when they enter the United States, but later attain qualified status. There is no indication that Congress intended to deny aliens who legally enter the United States and later attain qualified alien status from achieving eligibility for food stamps through the 5-year residency rule. In fact, the Committee report on FSRIA indicates that the Senate version of Section 4401 would have restricted application of the 5-year residence rule by denying it to aliens who enter the country illegally and remain illegally for a period of one year or more. However, the provision was eliminated in Conference. This supports the view that Congress intended the 5-year residency rule to apply to any alien who attains qualified alien status, regardless of their status when they arrived in the United States. The Department is proposing to amend current regulations at 7 CFR 273.4(a)(5)(ii) to make eligible for the Food Stamp Program any alien who has resided in the United States in a

qualified alien status as defined in PRWORA for 5 years.

Several groups interested in this provision have asked the Department if, after attaining qualified status, an alien can leave the country for periods of time but still become eligible for food stamps 5 years from the date he or she attained qualified status. The Department interprets the 5-year residency rule as establishing eligibility for an alien who resides here in qualified alien status for a total of 5 years. The 5 years do not need to be consecutive. Therefore, a qualified alien who resides in the United States for two years, leaves the country for a period of time long enough to lose his or her qualified status under INS rules, but then returns to the United States and resides here in a qualified status for another three years will attain eligibility for the program.

The 5-year residency rule has a significant impact on existing regulations related to qualified aliens. First, it effectively eliminates the 7-year time limit on food stamp participation for qualified aliens who are eligible for the program because they meet the criteria set out in PRWORA and at 7 CFR 273.4(a)(5)(ii)(B) through (a)(5)(ii)(F). Aliens who meet the criteria at 7 CFR 273.4(a)(5)(ii)(B) through (a)(5)(ii)(E) are by definition qualified aliens, and Amerasians admitted pursuant to section 584 of Public Law 100-202, as amended by Public Law 100-461 are legal permanent residents. Thus, any alien who would be eligible for food stamps under 7 CFR 273.4(a)(5)(ii)(B) through (a)(5)(ii)(F) will be eligible to receive food stamps for 7 years, but by the fifth year of participation will become permanently eligible for food stamps by virtue of the 5-year residency rule. Because the 5-year residency rule effectively eliminates the 7-year time limit on food stamp eligibility, the Department is proposing to amend current regulations at 7 CFR 273.4(a)(5)(ii)(B) through (a)(5)(ii)(F) to remove reference to the 7-year time limit. The 5-year residency rule also makes two additional categories of qualified aliens eligible for food stamps. Currently, an alien who is paroled into the United States under section 212(d)(5) of the INA for a period of at least 1 year or who has been granted conditional entry pursuant to section 203(a)(7) of the INA as in effect prior to April 1, 1980, is a qualified alien. However, neither parolee status nor conditional entrant status in themselves are enough to make a qualified alien eligible for the program. To be eligible, the parolee or conditional entrant would have to satisfy one of the requirements at 7 CFR 273.4(a)(5)(ii).

However, now, under the 5-year residency rule, parolees and conditional entrants who retain qualified alien status for 5 years are eligible for the program.

Section 4401 also effectively reduces the applicability of the 40 quarters of work requirement for aliens lawfully admitted for permanent residence under PRWORA and 7 CFR 273.4(a)(5)(ii)(A). Under current rules, to be eligible to participate in the Food Stamp Program, an alien who is a qualified alien because he or she was admitted for permanent residence must have or be credited with 40 qualifying quarters of work to qualify for this exception. Thus, generally, a lawful permanent resident must work for 10 years before becoming eligible to participate in the Food Stamp Program. However, as a result of Section 4401, a lawful permanent resident will now become eligible for food stamps after residing in the United States for five years, whether he or she has any qualifying quarters or not. The 40 quarters requirement is only applicable in cases of lawful permanent residents who have been in the United States less than five years but can still claim 40 qualifying quarters of work, such as in the case of an individual who claims quarters credited from the work of a parent earned before the applicant became 18. Such individuals may be eligible for the program under 7 CFR 273.4(a)(5)(ii)(A) even though they have not resided in the United States for five years.

Although the 40 qualifying quarters requirement has been minimized as an eligibility requirement, it continues to play a role in the area of deeming of the income of a sponsor to a sponsored alien. As discussed below, current regulations at 7 CFR 273.4(c) require that when determining the eligibility and benefit levels of a household in which a sponsored alien is an eligible member, the State agency counts a portion of the income and resources of the sponsor as the unearned income and resources of the sponsored alien. Except for aliens exempt from the deeming requirement in accordance with 7 CFR 273.4(c)(3), the deeming requirement applies until the alien has worked or can receive credit for 40 qualifying quarters of work, gains United States citizenship, or his or her sponsor dies. Thus, even though a lawful permanent resident may be eligible for the Food Stamp Program after 5 years without any qualifying quarters of work, the deeming requirement may apply to the individual until he or she works or can receive credit for 40 qualifying quarters.

In addition to extending eligibility to aliens who satisfy the 5-year residency

requirement, Section 4401 also extends eligibility to two other groups of qualified aliens. First, Section 4401 extends eligibility for the Food Stamp Program to all qualified aliens who meet the definition of disabled at Section 3(r) of the Act regardless of the date they began residing in the United States. As noted above, under current rules at 7 CFR 273.4(a)(5)(ii)(H), only those qualified aliens meeting the program's definition of disabled who were lawfully residing in the United States on August 22, 1996, were eligible for food stamps. Beginning October 1, 2002, the effective date of the provision, all qualified aliens who meet the program's definition of disabled are eligible for the program, regardless of the day they began residing in the United States.

Under Section 3(r) of the Act, persons are considered disabled for food stamp purposes if they are receiving or are certified to receive Supplemental Security Income (SSI), Social Security disability, federal or state disability retirement benefits for a permanent disability, veteran's disability benefits, or railroad retirement disability. In addition, persons receiving disability-related Medicaid, state-funded medical assistance benefits, and state General Assistance benefits may be considered disabled for food stamp purposes if they are determined disabled using criteria as stringent as federal SSI criteria. Several States have asked if receipt of benefits under a state Medicaid replacement program would make a qualified alien eligible for food stamps under Section 4401. State Medicaid replacement programs are State-funded programs that provided medical assistance to aliens ineligible for Medicaid. Qualified aliens receiving benefits under such programs would be eligible for food stamps if the programs are equivalent to the State's disability based general assistance programs that meet the Federal SSI disability or blindness criteria.

Second, Section 4401 extends eligibility to all qualified aliens who are under the age of 18. As noted above, under current rules at 7 CFR 273.4(a)(5)(ii)(J), only those qualified aliens under the age of 18 who were lawfully residing in the United States on August 22, 1996, were eligible for food stamps. Beginning October 1, 2003, the effective date of the provision, all qualified aliens under the age of 18 are eligible for the program, regardless of the date they lawfully entered the United States.

The Department is proposing to amend 7 CFR 273.4(a)(5)(ii) to incorporate the revised eligibility

requirements for certain qualified aliens.

In regard to the new eligibility requirements for legal immigrants, several states have asked the Department when it should add previously ineligible aliens who become eligible in the middle of a month to a food stamp household. For example, if an ineligible alien attains 5 years of residence in a qualified alien status in the middle of the month, such as May 15, should the alien be added immediately to the household or added in the beginning of the next month? The Department believes that current regulations address this issue. Current rules at 7 CFR 273.12(c)(1)(ii) provide that if the household reports a new member, and the change increases the household's benefit, the State must make the change effective not later than the first allotment issued 10 days after the change was reported. Thus, if the change was reported on May 15, the State agency would have to make the change effective for the June allotment. If the State agency could not make the change prior to issuing the June allotment, the regulations require that it issue the household a supplement for June. If the addition of the new household member would decrease the household's benefits, regulations at 7 CFR 273.12(c)(2) require that the State agency make the change effective for the allotment issued in the month following the month in which the adverse action notice period expires.

## *2. Elimination of the Deeming Requirement for Noncitizen Children*

In addition to expanding Food Stamp Program eligibility to certain noncitizens, Section 4401 of FSRIA also removed deeming requirements for immigrant children. Deeming is the process by which the State agency counts a portion of the income and resources of an alien's sponsor as income and resources belonging to the alien when determining the latter's eligibility for the Food Stamp Program and amount of benefits. Both Section 421(a) of PRWORA and Section 5(i) of the Act impose deeming requirements on the Food Stamp Program. The requirements of the two laws are not fully consistent, however. The Department addressed and resolved the inconsistencies in the final rule on Noncitizen Eligibility and Certification Provisions of Pub. L. 104-193, as amended by Public Laws 104-208, 105-33 and 105-185 (NCEP), published on November 21, 2000 at 65 FR 70134. Readers wishing a fuller understanding of the interaction of the two laws are referred to that rule.

Current deeming requirements appear in food stamp regulations at 7 CFR 273.4(c). The regulations define a sponsored alien as an alien for whom the sponsor has executed an affidavit of support (INS Form I-864 or I-864A) on behalf of the alien pursuant to Section 213A of the INA. In determining the eligibility and benefit levels of a household in which the sponsored alien is an eligible household member, the State agency counts a portion of the income and resources of the sponsor as the unearned income and resources of the sponsored alien. The State agency must count the income and resources of the sponsor's spouse as income and resources of the sponsored alien if the spouse also executed an affidavit of support for the sponsored alien. The State agency may not count the income and resources of a sponsor when the sponsored alien in the applicant household is ineligible to participate in the Food Stamp Program. If an alien's sponsor is sponsoring more than one alien, and the sponsored alien can demonstrate this to the State agency's satisfaction, the State agency must divide the sponsor's deemable income and resources by the number of such sponsored aliens. Unless the sponsored alien is exempt from the deeming requirements, the State agency must deem the sponsor's income and resources to the sponsored alien until the alien gains U.S. citizenship, has worked or can receive credit for 40 qualifying quarters of work, or the sponsor dies.

The amount of the sponsor's income deemed to the sponsored alien is the total monthly earned and unearned income of the sponsor (as determined in accordance with program regulations) at the time of certification minus 20 percent of the sponsor's earned income and minus an amount equal to the Food Stamp Program's monthly gross income limit for a household equal in size to the sponsor, the sponsor's spouse, and any other person who is claimed or could be claimed by the sponsor or the sponsor's spouse as a dependent for Federal income tax purposes.

The amount of the sponsor's resources deemed to the sponsored alien is the sponsor's total resources (as determined in accordance with program regulations) reduced by \$1,500. The State agency must not deem the sponsor's income and resources to a sponsored alien if the sponsored alien is any of the following:

- An alien who is a member of his or her sponsor's food stamp household;
- An alien who is sponsored by an organization or group as opposed to an individual;

- An alien who is not required to have a sponsor under the Immigration and Nationality Act, such as a refugee, a parolee, an asylee, or a Cuban or Haitian entrant;
- An indigent alien that the State agency has determined is unable to obtain food and shelter taking into account the alien's own income plus any cash, food, housing, or other assistance provided by other individuals, including the sponsor(s); and
- A battered alien spouse, alien parent of a battered child, or child of a battered alien, for 12 months after the State agency determines that the battering is substantially connected to the need for benefits, and the battered individual does not live with the batterer. After 12 months, the State agency must not deem the batterer's income and resources if the battery is recognized by a court or the INS and has a substantial connection to the need for benefits, and the alien does not live with the batterer.

Section 4401 of FSRIA amends Section 421 of PRWORA and Section 5(i) of the Act (7 U.S.C. 2014(i)) to add aliens under the age of 18 to the list of sponsored aliens excluded from deeming requirements. Therefore, as of October 1, 2003, the effective date of the provision, the State agency may not count the income and resources of the sponsor of an alien under the age of 18 when determining the eligibility or benefit level of the sponsored alien's household. The Department is proposing to amend current regulations at 7 CFR 273.4(c)(3) to add sponsored aliens under the age of 18 to the list of aliens exempt from deeming requirements.

In response to the Department's implementing memorandum on FSRIA, a State agency asked how the program's deeming requirements would apply when an adult and child in the same food stamp household have the same sponsor. As noted above, under current rules at 7 CFR 273.4(c)(2)(v), if an alien's sponsor sponsors more than one alien, the State agency will divide the sponsor's deemable income and resources by the number of sponsored aliens and deem to each alien his or her portion. For example, if a sponsor sponsors two aliens who reside in separate households, both of whom are applying for food stamps, the State agency will deem to both aliens (and thus both households) one-half of the sponsor's deemable income and resources. If a sponsor sponsors two aliens who reside in the same household, the State agency will in effect deem to the household 100

percent of the sponsor's deemable income and resources. However, because sponsored aliens under the age of 18 will now be exempt from deeming requirements, following current rules, the State agency must only deem one-half of the sponsor's income to the household. Even though the State agency will not deem any of the sponsor's income and resources to the alien child, the sponsor is still sponsoring the child and under 7 CFR 273.4(c)(2)(v), if a sponsor sponsors more than one alien, his or her deemable income and resources are divided amongst each alien he or she sponsors. Thus, if the sponsor sponsors two aliens, an adult and a child who reside in the same food stamp household, the State agency must divide the sponsor's deemable income and resources by two and deem one-half of such income and resources to the sponsored adult alien. The State agency would deem nothing to the child. The Department is proposing to amend current regulations at 7 CFR 273.4(c)(2)(v) to clarify this point.

At informational meetings, several groups raised an issue about current deeming rules for indigent aliens. As noted above, regular deeming rules do not apply to aliens that have been determined indigent by the State agency. Current rules at 7 CFR 273.4(c)(3)(iv) define an indigent alien as one whose income, consisting of the alien's household's own income and any cash and in-kind assistance provided by the alien's sponsor and others, does not exceed 130 percent of the poverty line for the alien's household's size. If an alien is indigent, the State agency may only deem to the alien the amount of income and resources actually provided by the sponsor. Under current rules, the State agency makes the indigence determination at the time of application, and the determination is good for 12 months.

Current rules also require that the State agency notify the Attorney General of any time a sponsored alien has been determined indigent, and include in the notification the names of the sponsor and sponsored aliens. Under Section 423(b) of PRWORA, upon notification that a sponsored alien has received any benefit under any means-tested public benefits program, the appropriate Federal, State, or political subdivision of a State must request reimbursement by the sponsor in the amount of such assistance.

Immigrant advocacy organizations have raised concerns that some eligible aliens may be deterred from applying for food stamps because of the Attorney

General notification requirement and sponsor liability, which could lead to reprisals from their sponsors. The groups have suggested that the Department allow alien applicants to opt out of the indigence determination and have their eligibility and benefit levels determined under regular deeming rules.

The Department agrees that the mandatory notification requirement may be a deterrent to participation for some eligible aliens. We are proposing to amend current rules at 7 CFR 273.4(c)(3)(iv) to allow a household to opt out of the indigence determination and to be subject to regular sponsor deeming rules at 7 CFR 273.4(c)(2).

The advocacy organizations have also asked the Department if State agencies may develop an administrative process which requires an eligible sponsored alien to provide consent before release of information to the Attorney General or the sponsor. These groups feel that many sponsored aliens will learn of the Attorney General notification and sponsor liability requirements only after they have disclosed their immigration status and SSN. Fearing adverse consequences as a result of the notification requirements, the sponsored aliens may withdraw the entire food stamp application, resulting in other household members, in many cases U.S. citizen children, losing the opportunity to receive benefits.

We believe it is within the discretion of the State agencies to utilize a process under which information about the sponsored alien is not shared with the Attorney General or the sponsor without consent so long as the sponsored alien is made aware of the consequences of failure to grant consent or failure to provide any other information necessary for the purposes of deeming the sponsors income to the alien. Pursuant to 7 CFR 273.4(c)(5), until the alien provides information or verification necessary to carry out the deeming requirements the sponsored alien is ineligible. Failure to provide consent to disclose information to the Attorney General or the sponsor would be tantamount to failure to provide the information, thus rendering the sponsored alien ineligible.

#### **Simplified Definition of Resources—7 CFR 273.8**

Current regulations at 7 CFR 273.8 reflect the pre-FSRIA requirement that State agencies apply the uniform national resource standards of eligibility to all applicant households, including those households in which members are recipients of federally aided public assistance, general assistance, or

supplemental security income. However, households which are categorically eligible for the Food Stamp Program, as reflected in 7 CFR 273.2(j)(2) or (j)(4), do not have to meet the program's resource limits.

Under current regulations at 7 CFR 273.8(b), to be eligible for the program, a household's allowable resources, including both liquid and non-liquid assets, cannot exceed \$2,000. However, the resource limit is \$3,000 for any household that includes at least one member who is 60 years of age or older. Current regulations at 7 CFR 273.8(e) list resources that may be excluded from the resource test when determining a household's eligibility.

Section 4107 of FSRIA amends Section 5(g) of the Act (7 U.S.C. 2014(g)) to increase the resource limit for households with a disabled person from \$2,000 to \$3,000. It also amends the Act to provide State agencies the option to exclude from resource consideration any resources that the State agency excludes when determining eligibility for (1) cash assistance under a program funded under part A of title IV of the Social Security Act; or (2) medical assistance under Section 1931 of the Social Security Act (SSA). However, State agencies that choose this option may not exclude cash; licensed vehicles; amounts in any account in a financial institution that are readily available to the household; or other resources the Department determines by regulation to be essential to equitable determinations of eligibility under the Food Stamp Program.

For the purposes of this proposed regulation, "cash assistance under a program funded under part A of title IV of the Social Security Act" means assistance as defined in the Temporary Assistance for Needy Families (TANF) regulations at 45 CFR 260.31(a)(1) and (a)(2), except for programs grandfathered under Section 404(a)(2) of the Social Security Act. Under 45 CFR 260.31(a)(1) and (a)(2), "assistance" includes "cash, payments, vouchers, and other forms of benefits designed to meet a family's ongoing basic needs (*i.e.*, for food, clothing, shelter, utilities, household goods, personal care items, and general incidental expenses) \* \* \*". It includes such benefits even when they are provided in the form of payments by a TANF agency, or other agency on its behalf, to individual recipients, and conditioned on participation in work experience or community service (or any other work activity under Sec. 261.30 \* \* \*). Programs grandfathered under Section 404(a)(2) of the Social Security Act include emergency foster care, the Job

Opportunities and Basic Skills program and juvenile justice. We do not believe that these grand-fathered programs are what the Congress meant when it used the term "cash assistance" in the statute, even though they may involve a cash payment to a family.

"Medical assistance under Section 1931 of the Social Security Act" means Medicaid for low-income families with children. This section, which was added by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Reform), allows low-income families with children to qualify for Medicaid. It requires that States use the AFDC income and resource standards that were in effect in July 1996, but it also provides options for States to use less restrictive income and resources tests for these families.

For the purposes of this regulation, the Department further proposes that the TANF cash assistance and Medicaid programs from which State agencies can adopt resource exclusions for the Food Stamp Program exclude programs that do not evaluate the financial circumstances of adults in the household while determining eligibility and benefits. We believe that this proposal is in line with the types of State TANF and Medicaid programs Congress envisioned under this provision, and maintains state flexibility.

The requirement at 7 CFR 273.8(c)(3) to deem the resources of sponsors of aliens continues to be in effect. However, if a State agency has chosen in accordance with proposed new paragraph 7 CFR 273.8(e)(19) to exclude a type of resource excluded for TANF or Medicaid, and the alien's sponsor owns that resource, the State agency would not include that resource when determining which resources to deem to the sponsored alien's household.

To ensure that determinations of eligibility under the Food Stamp Program remain equitable, the Department proposes that stocks, bonds, and savings certificates not be excluded from household resources under this rule.

In order to implement section 4107, the Department is proposing to amend 7 CFR 273.8(b) to extend the \$3,000 resource limit to households which contain a disabled member or members. (The food stamp definition of a disabled member is reflected at 7 CFR 271.2). The Department is also proposing to amend 7 CFR 273.8 to add a new paragraph (e)(19) which will provide State agencies the option to exclude from resource consideration for food stamp purposes any resources they exclude when determining eligibility for TANF

cash assistance or medical assistance under Section 1931 of the SSA. However, a State agency that selects this option may not exclude the following:

1. Licensed vehicles not excluded under Section 5(g)(2)(C) or (D) of the Act. (Section 5(g)(2)(D) allows State agencies to substitute the vehicle rules they use in their TANF programs for the food stamp vehicle rules when doing so results in a lower attribution of resources to the household.); and

2. Cash on hand and amounts in any account in a financial institution that are readily available to the household, including money in checking or savings accounts, stocks, bonds, or savings certificates.

The term 'readily available' applies to resources, in financial institutions, that can be converted to cash in a single transaction without going to court to obtain access or incurring a financial penalty other than loss of interest. Under the proposed provision, State agencies could exclude deposits in individual development accounts (IDA's) made under written agreements that restrict the use of such deposits to home purchase, higher education, or starting a business. They could also exclude deposits in individual retirement accounts (IRA's) the terms of which enforce a penalty, other than forfeiture of interest, for early withdrawal.

#### **Simplified Definition of Income—7 CFR 273.9(c)**

Section 5(d) of the Act (7 U.S.C. 2014(d)) specifies types of income that State agencies must exclude from a household's income when determining the household's eligibility for the program and benefit levels. Section 4102 of FSRIA amends Section 5(d) to add three new categories of income that, at the option of the State agency, may also be excluded from household income. Under the amendment, State agencies may, at their option, exclude the following types of income:

1. Educational loans on which payment is deferred, grants, scholarships, fellowships, veteran's educational benefits and the like that are required to be excluded under a State's Medicaid rules;

2. State complementary assistance program payments excluded for the purpose of determining eligibility for medical assistance under section 1931 of the Social Security Act; and

3. Any types of income that the State agency does not consider when determining eligibility or benefits for TANF cash assistance or eligibility for medical assistance under section 1931.

However, a State agency may not exclude the following:

- Wages or salaries;
- Benefits under Titles I (Grants to States for Old-Age Assistance for the Aged), II (Federal Old Age, Survivors, and Disability Insurance Benefits), IV (Grants to States for Aid and Services to Needy Families with Children and for Child-Welfare Services), XIV (Grants to States for Aid to the Permanently and Totally Disabled) or XVI (Grants To States For Aid To The Aged, Blind, Or Disabled and Supplemental Security Income) of the Social Security Act (SSA);

- Regular payments from a government source (such as unemployment benefits and general assistance);
- Worker's compensation;
- Legally obligated child support payments made to the household; or
- Other types of income that are determined by the Secretary through regulations to be essential to equitable determinations of eligibility and benefit levels.

The Department is proposing to amend current regulations at 7 CFR 273.9(c) to permit exclusion of the new types of income at State agency option. Current regulations at 7 CFR 273.9(c)(3) already provide an exclusion for educational assistance including grants, scholarships, fellowships, and work-study. That exclusion (based on an exclusion provided at Section 5(d)(3) of the Act) is limited to educational assistance provided to a household member who is enrolled at a recognized institution of post-secondary education and that is used or earmarked for tuition or other allowable expenses. To the extent that a State's Medicaid rules require exclusion of additional educational assistance, *i.e.*, educational assistance that would not be excludable under the current rules at 7 CFR 273.9(c)(3), the State agency has the option of excluding that additional assistance from income for food stamp purposes. Thus, the Department is proposing to amend 7 CFR 273.9(c)(3) to state that, at a minimum, the State agency must exclude educational assistance provided to a household member who is enrolled at a recognized institution of post-secondary education and that is used or earmarked for tuition or other allowable expenses, and that at its option it may exclude any educational assistance required to be excluded under its State Medicaid rules that would not already be excluded under food stamp rules. State agencies that opt to exclude educational assistance that is excluded under Medicaid under this provision must

include a statement in their State Plan to that effect, including a statement of the types of educational assistance that are being excluded under the provision.

The Department is also proposing to add a new paragraph, 7 CFR 273.9(c)(18), to provide for the exclusion, at State agency option, of any State complementary assistance program payments excluded for the purpose of determining eligibility for medical assistance under section 1931 of the Social Security Act. Section 1931 grants Medicaid eligibility to families who meet the eligibility standards for the Aid to Families with Dependent Children (AFDC) program in effect in their State on July 16, 1996. Complementary assistance relates to certain types of assistance provided under the old AFDC program. The Department asks that State agencies, in their comments to this proposed rule, include examples of the types of payments which fall under the category of State complementary assistance program payments. State agencies that opt to exclude State complementary assistance program payments under this provision must include a statement in their State Plan to that effect, including a description of the types of payments that are being excluded under the provision.

The Department is also proposing to add a new paragraph, 7 CFR 273.9(c)(19), to allow the State agency at its option to exclude from income any types of income that the State agency does not consider when determining eligibility or benefits for TANF cash assistance or eligibility for medical assistance under section 1931. For the purposes of this proposed regulation, "cash assistance under a program funded under part A of title IV of the Social Security Act" means assistance as defined in the Temporary Assistance for Needy Families (TANF) regulations at 45 CFR 260.31(a)(1) and (2), except for programs grand-fathered under Section 404(a)(2) of the Social Security Act. Under 45 CFR 260.31(a)(1) and (2), "assistance" includes "cash, payments, vouchers, and other forms of benefits designed to meet a family's ongoing basic needs (*i.e.*, for food, clothing, shelter, utilities, household goods, personal care items, and general incidental expenses) \* \* \* It includes such benefits even when they are provided in the form of payments by a TANF agency, or other agency on its behalf, to individual recipients, and conditioned on participation in work experience or community service (or any other work activity under Sec. 261.30 \* \* \*)." Programs grand-fathered under Section 404(a)(2) of the

Social Security Act include emergency foster care, the Job Opportunities and Basic Skills program and juvenile justice. We do not believe that these grand-fathered programs are what the Congress meant when it used the term "cash assistance" in the statute, even though they may involve a cash payment to a family.

"Medical assistance under Section 1931 of the Social Security Act" means Medicaid for low-income families with children. This section, which was added by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Reform), allows low-income families with children to qualify for Medicaid. It requires that States use the AFDC income and resource standards that were in effect in July 1996, but it also provides options for States to use less restrictive income and resources tests for these families.

For the purposes of this regulation, the Department further proposes that the TANF cash assistance and Medicaid programs from which State agencies can adopt income exclusions for the Food Stamp Program exclude programs that do not evaluate the financial circumstances of adults in the household while determining eligibility and benefits. We believe that this proposal is in line with the types of State TANF and Medicaid programs Congress envisioned under this provision, and maintains state flexibility.

Consistent with the requirements of Section 4102 of FSRIA, the State agency may not exclude wages or salaries, benefits under Titles I, II, IV, XIV or XVI of the SSA, regular payments from a government source, worker's compensation, or legally obligated child support payments made to the household. State agencies that opt to exclude any types of income under this provision must include a statement in their State Plan to that effect and describe the types of income being excluded.

States have asked the Department for clarification on some of the types of income that must be counted under Section 4102. First, States have asked whether adoption or foster care payments made to a household must be counted as income if they are excluded for TANF or Medicaid purposes. Section 4102 specifically requires that benefits paid under Title IV of the SSA be counted as income for food stamp purposes. Title IV-E of the SSA authorizes federal payments for foster care and adoption assistance. Therefore, any benefits received by a food stamp household pursuant to a program

operated under Title IV–E must be counted as income to the household.

Second, States have asked for additional examples of what constitutes regular payments from a government source. Section 4102 offers two examples, unemployment and general assistance. The Department would also include in this category payments such as the Alaska Permanent Fund Dividend (PFD). The Alaska PFD is an annual payment to all Alaska residents based on oil revenues. The State has been making the payments since 1982. Because the State has been making the payments every year for the last 20 years, the Department believes that they must be considered as regular government payments under Section 4102 and, therefore, countable as household income for the Food Stamp Program. Another example of a regular payment from a government source that must be counted as income for food stamps even if excluded for TANF or Medicaid are VISTA payments made under Title I of the Domestic Volunteer Service Act of 1973. Finally, payments or allowances a household receives from an intermediary that are funded from a government source should also be counted as regular payments from a government source. For example, if a household is participating in an on-the-job training program and is being paid by an employer with funds provided by a Federal, State or local government, the State agency must count those payments as income for food stamp purposes even if they would be excluded under TANF or Medicaid. This requirement does not apply to payments which are excluded from income for the purposes of determining food stamp eligibility under another provision of law.

Finally, several State agencies have asked the Department to define more fully the types of child support payments that must be counted as income under Section 4102. Section 4102 explicitly requires that legally obligated child support payments made to the households be counted as income. This requirement includes any portion of a household's child support payments that are passed-through to the household under the State's TANF program. State agencies have also asked whether voluntary child support payments, or payments that are not legally obligated, must be counted as income. In regard to voluntary child support payments, the Department does not believe that such payments should be treated more favorably than payments that are legally obligated. Therefore, the Department is proposing that all child support payments made to a household be counted as income for

food stamp purposes. However, the Department notes that there may be circumstances in which voluntary child support payments are made infrequently or irregularly to the household, and reminds States agencies that infrequent and irregular income can be excludable under current regulations at 7 CFR 273.9(c)(2) if not in excess of \$30 a quarter.

Section 4102 also prohibits State agencies from excluding types of income determined by the Department through regulations to be essential to equitable determinations of eligibility and benefit levels. Using this authority, the Department is proposing to add several types of income to the list of non-excludable income. First, the Department is proposing to require State agencies to count gross income from a self-employment enterprise. As noted above, Section 4102 requires State agencies to count wages or salaries for food stamp purpose even if these are excluded under TANF or Medicaid. The Department believes that self-employment income falls into the same category as wages or salaries. For the purposes of this provision, self-employment income includes the types of income described at 7 CFR 273.9(b)(ii), such as gain from the sale of any capital goods or equipment related to a business, income derived from a rental property when a household member is actively engaged in the management of the property for at least an average of 20 hours a week, and payments from a roomer or boarder. The Department is interested in hearing from States that exempt self-employment income for TANF or Medicaid purposes on the standards they use in determining the types and amounts of self-employment income to disregard.

Second, the Department is proposing to require State agencies to count annuities, pensions, retirement benefits, disability benefits, and old age or survivor benefits. These types of income, because they are regular payments, must be counted as income to the household under Section 4102 if they are paid by a government source. The Department does not believe that it is equitable to require that such income be counted when it is paid by a government source but excluded when paid by a private source.

Third, the Department is also proposing that State agencies be required to count monies withdrawn or dividends received by a household from trust funds considered to be excludable resources under 7 CFR 273.8(e)(8). The Department believes that trust fund disbursements may be of a significant

amount and may be made on a regular basis to the household.

Finally, the Department is proposing that State agencies be required to count support or alimony payments made directly to a household from nonhousehold members as income to the household. The Department believes that such payments should be treated similarly to child support payments which, as explained above, must be counted as income for food stamp purposes even if excluded for TANF or Medicaid purposes.

This proposal affords State agencies flexibility to simplify and conform administration of the Food Stamp Program to TANF and Medicaid, while ensuring equitable determinations of eligibility and benefit levels within Food Stamps. The proposal identifies those types of income that we believe should be counted because they are likely to be a regular and significant source of income to the household. If a State agency wishes to comment in this area, please be specific about how including or excluding such income would affect the State in its administration of the multiple programs.

The Department has received questions as to whether State agencies may use the authority provided under Sections 4109 of FSRIA to eliminate the requirement at 7 CFR 273.9(b)(3) to count the income of ineligible household members and the requirement at 7 CFR 273.9(b)(4) to deem sponsor income. State agencies must continue to follow these requirements. However, in determining the income of an ineligible household member or sponsor that should be counted as available to the household, State agencies must apply the income exclusion rules at 7 CFR 273.9 which, as proposed in this rule, provide State agencies the option to exclude some types of income that are excluded for TANF or Medicaid. For example, if a household contains a sponsored alien, the State agency must deem the income and resources of the sponsor to the household in accordance with 7 CFR 273.4(c)(2) and 273.9(b)(4). However, if the State agency has chosen in accordance with proposed new paragraph 7 CFR 273.9(c)(19) to exclude for food stamp purposes a type of income excluded for TANF or Medicaid, and the alien's sponsor receives that income, the State agency would not include that income when determining what income to deem to the sponsored alien's household.

**Child Support Payments—7 CFR 273.9(c) and (d)****1. State Option To Treat Child Support Payments as an Income Exclusion or Deduction**

To be eligible to participate in the Food Stamp Program, an applicant household that does not contain an elderly or disabled member must have a gross monthly income that is equal to or below the program's monthly gross income limit for the household's size. A household's gross monthly income for food stamp purposes is all income received by the household for the month from whatever source except certain types of income that are excluded under food stamp regulations at 7 CFR 273.9(c). Excluded income is subtracted from the household's monthly gross income before that income is compared against the program's gross income limit.

In addition to meeting the monthly gross income limit, all applicant households must also satisfy a monthly net income limit. An applicant household must have a net income that is equal to or below the program's monthly net income limit for the household's size. A household's monthly net income is its monthly gross income (*i.e.*, income after exclusions) minus any of the program's income deductions for which the household is eligible. The Food Stamp Program currently provides households with seven income deductions: (1) A standard deduction (which is provided to all food stamp households); (2) an earned income deduction equal to 20 percent of the household's gross earned income; (3) a medical deduction for expenses over \$35 a month for elderly or disabled household members; (4) up to a certain limit, a dependent care deduction for the actual costs the household must pay for the care of children or other dependents while household members are seeking or maintaining employment or while they are participating in education or training programs; (5) the costs for shelter which exceed 50 percent of income after other deductions (limited for households without an elderly or disabled member); (6) an optional shelter deduction for homeless households; and (7) a deduction for legally owed child support payments.

Current rules at 7 CFR 273.9(d)(5) provide households with a deduction from income for legally obligated child support payments paid by a household member to or for a nonhousehold member, including vendor payments made on behalf of the nonhousehold member. Section 4101 of FSRIA

amended the Act regarding child support payments by treating legally obligated child support payments made to nonhousehold members as excluded income but offering State agencies the option to continue to treat the payments as an income deduction rather than an exclusion. Section 4101 amends Section 5(d) of the Act (7 U.S.C. 2014(d)) to add legally obligated child support payments made by a household member to a nonhousehold member to the list of income exclusions. It also amends Section 5(e) by removing existing paragraph (4), which established the child support deduction, and inserting a new paragraph (4) giving State agencies the option of treating child support payments as an income deduction rather than as an exclusion.

In order to implement Section 4101 of FSRIA, the Department is proposing to amend 7 CFR 273.9 to add a new paragraph (c)(17) which will provide that legally obligated child support payments are excluded from household income. The paragraph will also provide that State agencies have the option of treating child support payments as an income deduction rather than an income exclusion, and will include a reference to 7 CFR 273.9(d)(5), which contains existing requirements for the child support deduction. That section will be amended to reference new 7 CFR 273.9(c)(17), and will provide that if the State agency chooses not to exclude legally obligated child support payments from household income, then it must provide eligible households with an income deduction for those payments. Section 273.9(d)(5) will be further amended to require States agencies that choose to provide a deduction rather than an exclusion to include a statement to that effect in their State plan of operation.

Child support payments that qualify under existing regulations for the income deduction will also qualify for the income exclusion. Under current regulations at 7 CFR 273.9(d)(5), a household can receive a deduction only for legally obligated child support payments paid by a household member to or for a nonhousehold member, including payments made to a third party on behalf of the nonhousehold member (vendor payments). No deduction is allowed for any amounts the household member is not legally obligated to pay. State agencies, in consultation with the State IV-D agency, may determine what constitutes a legal obligation to pay child support under State law. A deduction is also allowed for amounts paid toward child support arrearages. For more information on what qualifies as a child support

payment for purposes of the income deduction (and now exclusion), interested parties should refer to the final rule implementing the child support deduction, published on October 17, 1996, at 61 FR 54282.

State agencies should note that if they provide households an exclusion for legally obligated child support payments rather than a deduction, households reap the benefit of both. The exclusion would cause the household to have a lower gross income, making it more likely that the household would meet the program's monthly gross income limit and, therefore, making it more likely that the household would be eligible for the program. In addition, the excluded payments would not be counted as part of the household's net income, in effect deducting the payments from income.

**2. Order of Determining Deductions**

Current rules at 7 CFR 273.10(e)(1) specify the order in which State agencies must subtract deductions from income when calculating a household's net income. Under the rules, the order of subtraction is as follows: First, the 20 percent earned income deduction; second, the standard deduction; third, the excess medical deduction; fourth, dependent care deductions; fifth, the child support deduction; and finally the excess shelter deduction (or homeless shelter deduction for homeless households). The excess shelter deduction is subtracted last because, pursuant to Section 5(e)(6) of the Act (7 U.S.C. 2014(e)(6)), households are entitled to a deduction for monthly shelter costs that exceed 50 percent of their monthly income after all other program deductions have been allowed.

Section 4101 of FSRIA requires that if the State agency opts to provide households a deduction for legally obligated child support payments rather than an exclusion, the deduction be determined before computation of the excess shelter deduction. As noted in the previous paragraph, current rules already require that the child support deduction be subtracted from a household's income before the excess shelter deduction is computed. The Department is proposing to make only a minor change to current rules at 7 CFR 273.10(e)(1)(i)(F) to indicate that treating legally obligated child support payments as a deduction is a State option.

Several State agencies have asked the Department how a household's earned income deduction should be computed if the State agency grants an income exclusion for child support payments rather than a deduction. Under current

rules at 7 CFR 273.9(d)(2), the earned income deduction is equal to 20 percent of the household's gross earned income. Child support payments that are excluded from income are subtracted from the household's gross income. Thus, under current rules, if the State agency provides the household an income exclusion for child support payments, earned income used to make child support payments will not be part of the household's gross income when the State agency calculates the earned income deduction.

The Department believes the simplest way to address this problem is to amend current rules at 7 CFR 273.9(d)(2) and 273.10(e)(1)(i)(B) to specify that in determining the earned income deduction, the State agency must count any earnings used to pay child support that were excluded from the household's income in accordance with the child support exclusion at 7 CFR 273.9(c)(17). The Department welcomes suggestions from interested parties as to other methods for ensuring that households receive the full earned income deduction when they receive an income exclusion for child support payments.

### *3. State Option To Simplify Determination of Child Support Payments*

Current rules at 7 CFR 273.2(f)(1)(xii) require the State agency to verify, prior to a household's initial certification, the household's legal obligation to pay child support, the amount of the obligation, and the monthly amount of child support the household actually pays. The rules strongly encourage the State agency to obtain information regarding a household member's child support obligation and payments from Child Support Enforcement (CSE) agency automated data files.

Section 4101 of FSRIA amended Section 5 of the Act (7 U.S.C. 2014) to add a new paragraph (n) that directs the Department to establish simplified procedures that State agencies, at their option, can use to determine the amount of child support paid by a household, including procedures to allow the State agency to rely on information collected by the State's CSE agency concerning payments made in prior months in lieu of obtaining current information from the household.

To implement Section 4101, the Department is proposing to amend

current rules at 7 CFR 273.2(f)(1)(xii) to permit State agencies, in determining a household's legal obligation to pay child support, the amount of its obligation, and amounts the household has actually paid, to rely solely on information provided through its State's CSE agency and not require further reporting or verification by the household. This option would only be available in the cases of households that pay their child support through their state CSE agency. In order to allow the State's CSE agency to share information with the Food Stamp Program, State agencies following this procedure must require households eligible for the exclusion or deduction to sign a statement authorizing release of the household's child support payment records to the State agency. State agencies that chose this option must include a statement indicating that they have implemented the option in their state plan of operation.

The Department is also proposing to make conforming amendments to 7 CFR 273.2(f)(8)(i)(A), 7 CFR 273.12(a)(1)(vi) and (a)(4). The Department is not proposing any changes to the monthly reporting and retrospective budgeting rules at 7 CFR 273.21 because under 7 CFR 273.21(h) and (i) the State agency may determine what information must be reported on the monthly report and what information must be verified.

The Department would like to hear from State agencies interested in implementing this proposal whether there are any additional issues that the Department needs to address by regulation in order to make this an effective option for States. The Department also welcomes suggestions from interested parties as to other simplified methods State agencies could employ to determine the amount of legally obligated child support payments made by households.

### **Standard Deduction—7 CFR 273.9(d)(1)**

As noted above, a household's net income for food stamp purposes is its nonexcluded gross income minus any deductions for which the household is eligible. Section 5(e) of the Act (7 U.S.C. 2014(e)) lists the six allowable deductions. Section 5(e)(1) requires that the Department provide all households with a standard deduction. Formerly, Section 5(e)(1) set the standard deduction for the 48 contiguous States and the District of Columbia, Alaska,

Hawaii, Guam, and the Virgin Islands of the United States at \$134, \$229, \$189, \$269, and \$118, respectively. All households residing in one of the five geographic areas received the same standard deduction, regardless of household size. The standard deduction amounts were fixed and were not subject to any cost-of-living adjustment. Current rules at 7 CFR 273.9(d)(1) reflect these requirements.

Section 4103 of FSRIA amended section 5(e)(1) of the Act to replace the fixed standard deduction with one that is adjusted annually and that also varies by household size. Under the new provision, each household applying for or receiving food stamps in the 48 contiguous States, the District of Columbia, Hawaii, Alaska, and the U.S. Virgin Islands will receive a standard deduction that is equal to 8.31 percent of the Food Stamp Program's monthly net income limit for its household size, except for household sizes greater than six, which will receive the same standard deduction as a six person household. Section 4103 also requires that the standard deduction for any household not fall below the standard deduction in effect in FY 2002. As noted previously, the standard deductions in effect for FY 2002 for the 48 contiguous States and the District of Columbia, Alaska, Hawaii, Guam, and the Virgin Islands of the United States were \$134, \$229, \$189, \$269, and \$118, respectively.

To implement Section 4103, the Department will adjust the standard deduction every October 1 by multiplying the Food Stamp Program's monthly net income limits for household sizes one through six for the 48 contiguous States and the District of Columbia, Alaska, Hawaii, and the U.S. Virgin Islands by .0831, and rounding the result to the nearest whole dollar (*i.e.*, if .5 or higher, round up; if .49 or lower, round down). If the result is less than the FY 2002 standard deduction for any household size, that household size will receive the standard deduction in effect in FY 2002 for its geographic area.

The following chart illustrates how the standard deduction for FY 2003 was calculated for the 48 States and the District of Columbia. The same procedure was used to calculate the standard deductions for Hawaii, Alaska and the U.S. Virgin Islands.

## Standard Deduction Values

## 48 States and DC

| Size | Monthly Net<br>Income Limit<br>(in dollars) | New<br>Standard<br>Percentage | Computed FY<br>2003 Standard<br>Deduction<br>(in dollars) | FY 2002<br>Standard<br>Deduction<br>(in dollars) | Final FY 2003<br>Standard<br>Deduction<br>(in dollars) |
|------|---|-------------------------------|---|--|--|
| 1    | 739   | 8.31%                         | 61  | 134  | 134  |
| 2    | 995   | 8.31%                         | 83  | 134  | 134  |
| 3    | 1252  | 8.31%                         | 104   | 134  | 134  |
| 4    | 1509  | 8.31%                         | 125   | 134  | 134  |
| 5    | 1765  | 8.31%                         | 147   | 134  | 147  |
| 6+   | 2022  | 8.31%                         | 168   | 134  | 168  |

Section 4103 requires that for Guam, the standard deduction for household sizes one to six be equal to two times the monthly net income standard times 8.31 percent. Households with more

than six members must receive the same standard deduction as a six-person household. Section 4103 also requires that the standard deduction for any household in Guam not fall below the

standard deduction in effect in FY 2002. The following chart illustrates how the standard deductions for Guam for FY 2003 were calculated:

## Standard Deduction Values

## Guam

| Size | Monthly<br>Net Income<br>Limit<br>(in dollars) | Multiplied<br>by 2 | New<br>Standard<br>Percentage | FY 2003<br>Computed<br>Standard<br>Deduction<br>(in dollars) | FY 2002<br>Standard<br>Deduction<br>(in dollars) | Final FY<br>2003<br>Standard<br>Deduction<br>(in dollars) |
|------|--|--------------------|-------------------------------|--|--|---|
| 1    | 739  | 1,478              | 8.31%                         | 122  | 269  | 269   |
| 2    | 995  | 1,990              | 8.31%                         | 165  | 269  | 269   |
| 3    | 1252   | 2,504              | 8.31%                         | 208  | 269  | 269   |
| 4    | 1509   | 3,018              | 8.31%                         | 250  | 269  | 269   |
| 5    | 1765   | 3,530              | 8.31%                         | 293  | 269  | 293   |
| 6+   | 2022   | 4,044              | 8.31%                         | 336  | 269  | 336   |

The Department is proposing to amend current regulations at 7 CFR 273.9(d)(1) to reflect the new statutory requirements relating to the standard deduction discussed above. The Department will announce the adjusted standard deduction amounts annually, at the same time it announces the annual adjustments to the program's monthly gross and net income eligibility standards and the maximum allotments. Currently, the Department transmits the annual adjustments by memorandum to State agencies—customarily in August. The Department also posts the new numbers on the FNS Web site at [www.fns.usda.gov/fsp](http://www.fns.usda.gov/fsp) shortly after officially notifying State agencies.

Because the standard deduction received by food stamp households now varies by household size, State agencies have asked the Department whether, in establishing a household's size, it should count ineligible and disqualified members as members of the household. Under current rules at 7 CFR 273.11(c), ineligible and disqualified members are not included when determining the household's size for the purpose of

assigning a benefit level to the household, comparing the household's monthly income with the income eligibility standards, or comparing the household's resources with the resource eligibility limits. The Department proposes that ineligible and disqualified members also not be included when determining the household's size for the purpose of assigning a standard deduction to the household. The Department proposes to amend current rules at 7 CFR 273.11(c)(1)(ii) and (c)(2)(iv) to reflect this new requirement.

#### **Simplified Determination of Housing Costs—7 CFR 273.9(d)(6)(i)**

Current rules at 7 CFR 273.9(d)(6)(i) provide that State agencies may develop a homeless household shelter deduction to be used in place of the excess shelter deduction in determining the net income of homeless households. Under the rules, State agencies may set the homeless household shelter deduction at any amount up to a maximum of \$143 a month. State agencies may provide the deduction to a household in which all members are homeless and which is not

receiving free shelter throughout the month. However, State agencies may make households with extremely low shelter costs ineligible for the deduction. Households receiving the homeless household shelter deduction cannot also receive an excess shelter expense deduction; however, homeless households with actual shelter expenses that exceed their State's homeless household shelter deduction can opt to receive the excess shelter deduction instead of the homeless household shelter deduction if their actual shelter costs are verified.

Section 4105 of FSRIA amended Section 5(e) of the Act (7 U.S.C. 2014(e)) to grant State agencies the option of providing homeless households with a monthly shelter deduction of \$143 in lieu of providing them an excess shelter deduction. State agencies may provide the deduction to a household in which all members are homeless and which is not receiving free shelter throughout the month. However, State agencies may make households with extremely low shelter costs ineligible for the deduction.

Current regulations at 7 CFR 273.9(d)(6)(i) already reflect most of the requirements of Section 4105 of FSRIA. The only difference between the current rules and the requirements of Section 4105 is that current rules permit State agencies to develop their own homeless household shelter deduction up to a maximum of \$143 a month, whereas Section 4105 mandates that the homeless household shelter deduction be \$143 a month. The Department is proposing to amend regulations at 7 CFR 273.9(d)(6)(i) to require State agencies that choose to provide a homeless household shelter deduction to set the deduction at \$143 a month. The Department is also proposing to amend those regulations to require State agencies that implement the homeless household shelter deduction to include a statement indicating that they have implemented the option in their state plan of operation. The Department is also proposing to make a conforming amendment to regulations at 7 CFR 273.10(e)(1)(i)(G).

Although Section 4105 only addresses the homeless household shelter deduction, the Conference Report, in its discussion of Section 4105, directs the Department to “review current rules governing allowable shelter costs and their implementation and identify any means, within existing authority, to modify or communicate these rules in a manner that makes the determination of eligible shelter costs less complicated and error prone for food stamp participants and eligibility workers.” H.R. Conf. Rep. No. 107-424, at 537-538 (2002).

The Department routinely reviews the program’s policy and regulations in an effort to simplify procedures for State agencies and recipients. In recent years, the Department has issued several policy changes relating to shelter costs, including reinterpreting 7 CFR 273.9(d)(6)(ii) to allow condominium fees to be counted as deductible shelter costs, and rescinding a longstanding policy memo to eliminate reporting of changes in rent that are caused by changes in vendor payments.

In order that we may better respond to the directive contained in the Conference Report, the Department is asking for assistance from State agencies and other interested parties in identifying ways to further simplify existing procedures for determining allowable shelter expenses. Interested persons should send their comments to the address noted at the beginning of this document. Suggestions will be addressed in the final version of this rule.

#### **Simplified Standard Utility Allowance—7 CFR 273.9(d)(6)(iii)**

Current rules at 7 CFR 273.9(d)(6)(iii) provide State agencies the option of developing standard utility allowances (SUA) to be used in place of a household’s actual utility costs when determining the household’s excess shelter expenses deduction. State agencies may develop an SUA for any allowable utility expense listed in the regulations at 7 CFR 273.9(d)(6)(ii)(C). Allowable utility expenses listed in that section include the costs of heating and cooling; electricity or fuel used for purposes other than heating or cooling; water; sewerage; well and septic tank installation and maintenance; garbage collection; and telephone. State agencies may establish separate SUAs for each utility, an SUA that includes expenses for all allowable utilities including heating or cooling costs, and a limited utility allowance (LUA) which includes expenses for at least two allowable utility costs. The LUA may not include heating or cooling costs, except that if the State agency is offering the LUA to public housing residents it may include excess heating or cooling costs incurred by such residents.

The current rules at 7 CFR 273.9(d)(6)(iii) implement Section 5(e)(7)(C) of the Act (7 U.S.C. 2014(e)(7)(c)), which generally leaves it to the Department to develop regulations relating to SUAs. Section 5(e)(7)(c), however, does impose certain requirements on the use of SUAs. Among those requirements, the Act prohibits State agencies from providing an SUA that includes heating or cooling costs to households residing in public housing units which have central utility meters and which charge the households only for excess heating or cooling costs. The Act also requires that an SUA which includes heating or cooling costs be prorated if the household eligible for the SUA lives with and shares heating or cooling expenses with an individual not participating in the Food Stamp Program, or a household that is participating in the Program, or both. The Act also permits the State agency to mandate use of an SUA for households that incur the expenses included in the SUA if the State agency has developed one or more SUAs which include the costs of heating and cooling and one or more SUAs which do not include either cost, and the SUAs do not increase program costs. The Department has incorporated all of these requirements into current regulations. The prohibition on providing SUAs which include heating or cooling costs to residents of

certain public housing units is at 7 CFR 273.9(d)(6)(iii)(C) and (d)(6)(iii)(E); the requirement to prorate an SUA which includes heating or cooling costs when the eligible household lives and shares heating or cooling expenses with others is at 7 CFR 273.9(d)(6)(iii)(F); and the rules for mandating use of an SUA are at 7 CFR 273.9(d)(6)(iii)(E).

Section 4104 of FSRIA amends Section 5(e)(7)(C) of the Act to simplify current rules relating to the SUA when the State agency elects to make the SUA mandatory. First, Section 4104 allows State agencies that elect to make the SUA mandatory to provide an SUA that includes heating or cooling costs to residents of public housing units which have central utility meters and which charge the households only for excess heating or cooling costs. Second, it eliminates the current requirement to prorate the SUA when a household shares living quarters with others. Therefore, if the State agency mandates use of SUAs, a household eligible for an SUA that includes heating or cooling costs and lives and shares heating or cooling expenses with others must receive the full SUA.

As noted above, Section 5(e)(7)(C)(iii) requires that mandatory SUAs not increase the cost of the Food Stamp Program. Section 4104 of FSRIA further amends Section 5(e)(7)(C) to provide that in determining if a State agency’s mandatory SUAs are cost neutral, the Department not count any increase in cost that is due to providing an SUA that includes heating or cooling costs to residents of certain public housing units or to eliminating proration of the SUA for a household that shares living quarters and expenses with others.

The Department is proposing to amend current regulations at 7 CFR 273.9(d)(6)(iii) to incorporate the new requirements. The Department is further amending the regulations to require State agencies that opt to implement a mandatory SUA to include a statement to that effect in their state plan of operation.

The Department is taking the opportunity to address two SUA-related issues in this proposed rule. First, the Department is proposing a technical correction to the title of 7 CFR 273.9(d)(6). The title to the section was inadvertently changed in the NCEP final rule from “shelter costs” to “standard utility allowance.” The Department is proposing to amend 7 CFR 273.9(d)(6) to restore the proper title.

Second, the Department wishes to resolve a confusion relating to prorating the SUA when ineligible members are present in the household. Under current regulations at 7 CFR 273.9(d)(6)(iii)(F),

the State agency may not prorate the SUA if all the individuals who share utility expenses but are not in the food stamp household are excluded from the household only because they are ineligible. The Department's intent under this regulation was that households with ineligible members always receive the full SUA.

Current regulations at 7 CFR 273.11(c)(2)(iii) also contain requirements for prorating deductible expenses in households that contain certain types of ineligible members. Under those regulations, the State agency must prorate a household's allowable child support payment, shelter and dependent care expenses if they are paid by or billed to an ineligible member.

Because the SUA is a component of shelter costs, State agencies have interpreted both sets of regulations as applying to the SUA. However, on their face, the regulations appear to conflict. The regulations at 7 CFR 273.9(d)(6)(iii)(F) prohibit proration of the SUA when the household shares the expenses with an ineligible household member. However, the regulations at 7 CFR 273.11(c)(2)(iii) require proration of shelter expenses if the ineligible member is billed for or pays the expense. As a result, State agencies have been following different procedures in regard to prorating the SUA when the household includes an ineligible member, some prorating the SUA and some not.

The Department's intent is that when eligible household members share utility costs with ineligible members, and the household elects to use the SUA, the eligible household must receive the entire (as opposed to a prorated) SUA, regardless of who pays or is billed for the expenses included in the SUA. The Department understands, however, that states have adopted different policies and, therefore, we are not proposing any particular procedure in this rule but are suggesting two alternative procedures and asking interested parties to comment on which procedure they prefer. The Department intends to incorporate into the final rule the procedure that gets the most support from commenters. First, State agencies would implement the Department's original intention and not prorate the SUA when a household contains an ineligible member. Alternatively, State agencies would be required to prorate the SUA when the ineligible member pays either part or all of the expenses included in the SUA. Under this latter option, the household would be entitled to the full SUA if the expenses were paid in their entirety by eligible

household members, even if they were billed to the ineligible member.

#### **State Option To Reduce Reporting Requirements—7 CFR 273.12(a)(1)(vii)**

##### **1. Current Rules on Reporting Requirements**

The Act requires households certified for food stamps to report certain changes in their circumstances that occur during their certification periods. Section 6(c)(1)(A) of the Act (7 U.S.C. 2015(c)(1)(A)) permits State agencies to require households to report their income and circumstances on a periodic basis. The Act prohibits periodic reporting by (1) migrant or seasonal farmworker households, (2) households in which all members are homeless individuals, or (3) households that have no earned income and in which all adult members are elderly or disabled. It also prohibits periodic reporting on a monthly basis by households residing on Indian reservations if there was no monthly reporting system in operation on the Indian reservation on March 25, 1994. Section 6(c)(1)(B) of the Act provides that households not required to file periodic reports on a monthly basis must report changes in income or household circumstances in accordance with regulations issued by the Department.

Current regulations at 7 CFR 273.12(a)(1) require certified households which are not required to file monthly or quarterly reports to report the following changes in circumstances:

- Changes of more than \$50 in the amount of unearned income, except changes related to public assistance or general assistance in project areas in which GA and food stamp cases are jointly processed;
- Changes in the source of income, including starting or stopping a job or changing jobs, if the change in employment is accompanied by a change in income;
- Change in either the wage rate or salary or a change in full-time or part-time employment status, or a change in the amount earned of more than \$100;
- Changes in household composition, such as the addition or loss of a household member;
- Changes in residence and the resulting change in shelter costs;
- The acquisition of a licensed vehicle not fully excludable as a resource;
- When cash on hand, stocks, bonds, and money in a bank account or savings institution reach or exceed a total of \$2,000 (\$3,000 if the household contains at least one person who is 60 years of age or older or disabled);

- Changes in the legal obligation to pay child support; and

- For able-bodied adults subject to the food stamp time limit, changes in work hours that bring an individual below 20 hours per week, averaged monthly.

Current regulations at 7 CFR 273.12(a)(1)(vii) permit State agencies to simplify reporting requirements for households with earned income who are assigned certification periods of 6 months or longer. State agencies may require such households to report only changes in income that result in their gross monthly income exceeding 130 percent of the monthly poverty income guideline (*i.e.*, the program's monthly gross income limit) for their household size. If the State agency selects this option, it cannot require households certified for 6 months to report changes in circumstances in accordance with 7 CFR 273.12(a)(1) (except in the case of individuals subject to the food stamp time limit under 7 CFR 273.24, who must continue to report changes in work hours that bring them below 20 hours per week, averaged monthly). Households with earned income certified for longer than 6 months must submit an interim report at 6 months that includes all of the items subject to reporting under paragraph (a)(1)(i) through (a)(1)(vi). During the six-month reporting period, the State agency must act on changes reported by the household that increase benefits in accordance with 7 CFR 273.12(c) and on changes in public assistance (PA) and general assistance (GA) grants and other sources that are considered verified upon receipt by the State agency.

Current regulations at 7 CFR 273.12(a)(2) require that certified households report changes within 10 days of the date the changes become known to the household. For reportable changes of income, the State agency may require that change to be reported as early as within 10 days of the date that the household becomes aware of the change or as late as within 10 days of the date that the household receives the first payment attributable to the change. For households subject to simplified reporting, the household must report changes no later than 10 days from the end of the calendar month in which the change occurred, provided that the household has at least 10 days within which to report the change.

##### **2. FSRIA Changes**

Section 4109 of FSRIA amends Section 6(c)(1) of the Act to provide State agencies the option to extend simplified reporting procedures from just households with earnings to all

food stamp households. In addition, Section 4109 amends Section 6(c)(1) to provide that State agencies may require households that submit periodic reports in lieu of change reporting to submit such reports once every month up to once every six months. Households which are required to report less often than quarterly (*i.e.*, those required to report at 4-month, 5-month, or 6-month intervals) must report, in a manner prescribed by the Department, when their income for any month exceeds the program's monthly gross income limit for their household size.

### 3. Proposed Revisions to Reporting Requirements

The Department is proposing to move current regulations on simplified reporting from 7 CFR 273.12(a)(1)(vii) to 7 CFR 273.12(a)(5). The Department is proposing to amend current rules to include the following requirements:

- The State agency may include any household certified for at least 4 months within a simplified reporting system except households subject to monthly reporting under 7 CFR 273.21 or quarterly reporting under 7 CFR 273.12(a)(4). The statute does not provide the Department authority to apply simplified reporting to households certified for less than 4 months.
- Households exempt from periodic reporting under Section 6(c)(1)(A), which includes homeless households and migrant and seasonal farm workers, may be subject to simplified reporting but may not be required to submit periodic reports. The certification periods of such households must be at least 4 months but not more than 6 months. While it is technically possible for State agencies to use simplified reporting for elderly and disabled households with no earned income, the Department strongly discourages this practice. Under current regulations, these households are eligible for certification periods up to 24 months long. Under simplified reporting, they would have to be recertified at least every six months because these households cannot be required to submit periodic reports. Because these households rarely experience changes in their circumstances, imposing more frequent recertifications would increase their burden while providing little, if any, benefit to the States or the Federal government. The State agency may require other households subject to simplified reporting to submit periodic reports on their circumstances from once every 4 months up to once every 6 months.
- The State agency does not have to require periodic reporting by any household certified for 6 months or less. However, households certified for more than 6 months must submit a periodic report at least every 6 months.
- Households subject to simplified reporting must report when their monthly gross income exceeds the monthly gross income limit for their household size.
- Households will be required to report only if their income exceeds the monthly gross income limit for the household size that existed at the time of the household's most recent certification or recertification. The Department recognizes that a household's size may change during the certification period, but we believe it will be simpler for households to follow the reporting requirement if they make their decision whether or not to report based on the household size and income threshold provided to them at their most recent certification or recertification. Requiring the household to independently determine household size and the corresponding income threshold will likely be confusing for the household and error prone for the State agency.
- The periodic report form must request from the household information on any of the changes in circumstances listed at 7 CFR 273.12(a)(1)(i) through (a)(1)(vii).
- The periodic report form must be the sole reporting requirement for any information that is required to be reported on the form, except that households must report when their monthly gross income exceeds the monthly gross income limit for its household size and able-bodied adults subject to the time limit of § 273.24 must report whenever their work hours fall below 20 hours per week, averaged monthly.
- The State agency has two options for acting on changes in household circumstances reported outside the periodic report (other than changes in monthly gross income that exceed the monthly gross income limit for the household's size). First, the State agency may follow current procedures at 7 CFR 273.12(a)(1)(vii)(A). Those rules generally require that the State agency only act on changes that a household reports outside its periodic report if the changes would increase the household's benefits. Other than increases in income that result in income exceeding the monthly gross income limit, the State agency may only act on changes that would decrease benefits if the change, reported by the household or by another source, is verified upon receipt or is a change in the household's PA or GA grant. Second, the State agency may act on all reported client changes, regardless of whether such changes increase or decrease the household's benefits. Following implementation of simplified reporting in the NCEP final rule, the Department approved a number of waivers requesting this later procedure. To eliminate the need to approve future waivers, the Department is proposing to incorporate the procedure as an option in the regulations.
- The Department is also proposing that State agencies that choose to act on all reported changes not be required to act on changes a household reports for another public assistance program when the change does not trigger action in that other program but would decrease the household's food stamp benefit. For example, if a household receiving Medicaid as well as food stamps reports an increase in income to its Medicaid office that it is not required to report for food stamp purposes (*i.e.*, the income does not push the household over the monthly gross income limit for its household size), the State agency would not have to reduce the household's food stamp benefit if the income change would not trigger a change in the household's Medicaid eligibility or benefits. This provision is intended to relieve State agencies that choose to act on all reported changes from the burden of acting on reports required by another public assistance program that do not trigger action in that other program and would not increase the household's food stamp benefit.
- A State agency that opts to utilize simplified reporting procedures must include in its state plan of operation a statement that it has implemented the option and a description of the types of households to whom the option applies.

Current rules at 7 CFR 273.12(a)(1)(vii) do not address the procedures the State agency should follow if the household fails to submit a complete periodic report or if it submits a complete report that results in a reduction or termination of benefits. The Department is proposing that under such circumstances the State agency follow the same procedures used for quarterly reporting at 7 CFR 273.12(a)(4)(iii). Under the quarterly reporting requirements, if a household fails to file a complete report by the specified filing date, the State agency sends a notice to the household advising it of the missing or incomplete report no later than 10 days from the date the report should have been submitted. If the household does not respond to the notice, the household's participation is

terminated. If the household files a complete report resulting in reduction or termination of benefits, the State agency shall send an adequate notice, as defined in 7 CFR 271.2. The notice must be issued so that the household will receive it no later than the time that its benefits are normally received. If the household fails to provide sufficient information or verification regarding a deductible expense, the State agency will not terminate the household, but will instead determine the household's benefits without regard to the deduction.

The Department is also proposing that periodic reports be subject to the requirements at 7 CFR 273.12(b)(2), which currently apply only to quarterly reports. Section 273.12(b)(2) requires that quarterly reports be written in clear, simple language, and meet the program's bilingual requirements described in 7 CFR 272.4(b). It also requires that the quarterly report form specify the date by which the State agency must receive the form and the consequences of submitting a late or incomplete form; the verification the household must submit with the form; where the household can call for help in completing the form; and that it include a statement to be signed by a member of the household indicating his or her understanding that the information provided may result in reduction or termination of benefits.

#### **Simplified Determination of Deductions—7 CFR 273.12(c)**

Current rules at 7 CFR 273.9(d) provide households with seven income deductions: (1) A standard deduction (which is provided to all food stamp households); (2) an earned income deduction equal to 20 percent of the household's gross earned income; (3) a medical deduction for expenses over \$35 a month for elderly or disabled household members; (4) up to a certain limit, a dependent care deduction for the actual costs the household must pay for the care of children or other dependents while household members are seeking or maintaining employment or while they are participating in education or training programs; (5) the costs for shelter which exceed 50 percent of income after other deductions (limited for households without an elderly or disabled member); (6) an optional shelter deduction for homeless households; and (7) a deduction for legally owed child support payments. As explained above, deductions are subtracted from a household's nonexcluded monthly gross income to determine its monthly net income.

A household's eligibility for and amount of a deduction are established at the household's certification. As previously discussed in the Department's proposals amending 7 CFR 273.12(a), food stamp rules currently require a participating household to report certain changes in circumstances that occur during the certification period. Some of the changes that must be reported may affect a household's deductions.

Under change reporting rules at 7 CFR 273.12(a)(1)(i), households may be required to report when their earned income changes by more than \$100 in a given month. A change in the household's earned income can affect several deductions. It will have a direct effect on the household's earned income deduction. It may also affect the computation of a household's excess shelter deduction because the amount of the deduction is dependent on the household's gross income. Under 7 CFR 273.12(a)(1)(ii), households must report changes in composition which can affect the dependent care deduction and, as discussed in a previous section of this rule, may now affect the household's standard deduction. Under 7 CFR 273.12(a)(1)(iii), households must report changes in residence and the resulting changes in shelter costs, which may affect a household's excess shelter deduction. Finally, under 7 CFR 273.12(a)(1)(vi), households must report changes in the legal obligation to pay child support, which may affect the household's child support deduction. In accordance with rules at 7 CFR 273.10(d)(4), households eligible for the medical expense deduction are not required to file reports about their medical expenses during the certification period.

Under current rules on quarterly reporting at 7 CFR 273.12(a)(4) and simplified reporting at 7 CFR 273.12(a)(1)(vi), households must report on the items specified in 7 CFR 273.12(a)(1) through periodic reports. Under Monthly Reporting and Retrospective Budgeting (MRRB) rules at 7 CFR 273.21, the State agency may specify the household circumstances to be reported monthly. The State agency can require households subject to MRRB to report information over and above what is required under 7 CFR 273.12(a)(1). For example, a State agency could require monthly reporting of changes in alien status, shelter and utility expenses, and the actual amount of child support payments. In addition to mandatory reporting requirements under the regulations, recipient households may voluntarily report

changes in the amount of deductible expenses during the certification period.

Current rules at 7 CFR 273.12(c) specify the action that the State agency must take on changes in household circumstances reported during the certification period. The rules require the State agency to take prompt action on all reported changes to determine if they affect the household's eligibility or allotment. If a reported change increases the household's benefits, the State agency must make the change effective no later than the first allotment issued 10 days after the date the change was reported to the State agency. If the change decreases the household's benefit, or makes it ineligible for the program, the State agency must issue a notice of adverse action within 10 days of the date the change was reported and decrease the household's benefit effective no later than the allotment for the month following the month in which the notice of adverse action period has expired, provided a fair hearing and continuation of benefits have not been requested. If a notice of adverse action is not used due to one of the exemptions in 7 CFR 273.13(a)(3) or (b), the decrease must be made effective no later than the month following the change. For households eligible for the medical expense deduction, the State agency may only act on changes not voluntarily reported by the household if they are verified upon receipt and do not necessitate contact with the household.

Section 4106 of FSRIA amends Section 5(f)(1) of the Act (7 U.S.C. 2014(f)(1)) to provide State agencies the option of disregarding until a household's next recertification any changes that affect the amount of deductions for which a household is eligible. In other words, if a household reports a change in circumstance that would change a deduction amount or the household's eligibility for the deduction, the State agency may disregard the change and continue to provide the household the deduction amount that was established at certification until the household's next recertification, when it would have to amend the deduction to reflect the household's then current circumstances. However, section 4106 does require the State agency to act on two types of reported changes that affect deductions. First, the State agency must act on any change in a household's excess shelter cost stemming from a change in residence. Second, the State agency must act on changes in earned income in accordance with regulations established by the Department.

The Department is proposing to amend current regulations at 7 CFR 273.12(c) to provide State agencies the option of disregarding any changes that would affect the amount of a deduction or the household's eligibility for it until the household's next recertification. Under the proposed regulations, the State agency must act on changes in a household's excess shelter cost stemming from a change in residence and on changes in earned income. In addition, a State agency that implements the option must include a statement to that effect in its state plan of operation and it must specify the deductions affected.

Section 4106 provides that the State agency must act on changes in earned income in accordance with standards developed by the Department. The Department is proposing no change to current regulations in regard to the State agency's responsibility to act on reported changes in earned income. Current rules require the State agency to make appropriate changes to the household's deductions when there is a reported change in earned income. The Department believes that retaining current rules in this area imposes no additional administrative burden on State agencies and reflects the intent of the statute.

To provide State agencies with maximum flexibility, the Department is proposing that State agencies be permitted to ignore not only changes that affect deductions that are reported by the household, but also changes that the State agency learns from a source other than the household. For example, the State agency would not be required to act during the certification period on changes in a household's child support payments it discovers through a data match with the State's Title IV-D agency but could disregard such changes until the household's next recertification. The State agency, however, would continue to be required to change deductions as a result of changes in earned income and shelter costs arising from a change in residence which it learns from another source which are verified upon receipt.

Under the proposed regulations, the State agency has the option of ignoring changes (other than changes in earned income and changes in shelter costs related to a change in residence) for all deductions or for any particular deduction. The State agency may also ignore changes for deductions for certain categories of households while acting on changes for those same deductions for other types of households. The Department is proposing, however, that the State

agency not act on changes in only one direction. If the State agency chooses to act on changes that affect a deduction, then it must act on both changes that increase the deduction and changes that decrease the deduction. Acting only on changes that would decrease a household's deductions would unfairly harm households, while acting only on changes that would increase a household's deductions would increase program costs beyond what was anticipated when the provision was enacted.

The Department is concerned that this provision could harm households that experience significant increases in their expenses during their certification periods. The Department is considering including in the final regulation one of two limitations on the provision that would protect households: (1) Requiring State agencies that take this option to act on reported changes in expenses that exceed a certain dollar threshold; or (2) requiring state agencies that take this option to act on changes that affect deductions after the sixth month for households that are certified for 12 months. We are interested in hearing commenters' opinions about these restrictions as well as hearing other suggestions for reducing the potential harmful effect of the provision on households.

The Department is proposing a limitation on the State agency option to disregard acting on reported changes that affect deductions for households assigned 24-month certification periods. Under current rules at 7 CFR 273.10(f)(1), State agencies may assign certification periods of up to 24 months for households in which all adult members are elderly or disabled. Section 3(c) of the Act (7 U.S.C. 2012(c)) and the regulations at 7 CFR 273.10(f)(1) require the State agency to have a contact with elderly and disabled household certified for 24 months at least once every 12 months. The Department is proposing that the State agency act on changes affecting deductions that are reported by these households during the first 12 months of their certification period at the required 12-month contact. Changes reported during the second 12 months could be disregarded until the household's next recertification.

Current rules at 7 CFR 273.10(f)(2) require that State agencies certify for 24 months households residing on a reservation who are subject to monthly reporting. The Department is proposing that if the State agency chooses to disregard acting on changes that affect deductions for these households, the State agency act on changes reported by

these households during the first 12 months of their certification period in the thirteenth month of the household's certification period. Changes reported during the second 12 months could be disregarded until the household's next recertification.

In addition to amending current rules at 7 CFR 273.12(c), the Department is also proposing to amend current regulations at 7 CFR 273.21 to allow for the disregarding of changes that affect deductions for households subject to monthly reporting and retrospective budgeting. As with prospectively budgeted households, the State agency may not disregard the effect on household deductions of reported changes in earned income and changes in shelter costs related to a change in residence.

The Department is proposing to modify current rules at 7 CFR 273.12(b)(1) and (b)(2) and 273.21(h)(2) to require the State agency to give notice in all change report, periodic report, and monthly report forms if it intends to postpone changing deductions based on reported information until the household's next recertification.

#### **Transitional Food Stamps for Families Moving From Welfare—7 CFR 273.12(f)(4)**

Current regulations at 7 CFR 273.12(f)(4) provide State agencies the option to offer transitional food stamp benefits to households leaving the Temporary Assistance for Needy Families (TANF) program. Transitional benefits ensure that such households can continue to meet their nutritional needs as they adjust to the loss of cash assistance. The Department adopted the transitional benefit option in the NCEP final rule at 65 FR 70134. The option was not specifically authorized by statute, but was developed in response to comments received on the earlier proposed rule. For more information about the development of the transitional food stamp benefits policy, please refer to the NCEP final rule.

State agencies that elect the transitional benefit option freeze the food stamp benefits of a household leaving TANF for a period of up to 3 months (the transitional period). Thus, for up to 3 months, the household continues to receive the food stamp benefit it was receiving in the month that it exited TANF. However, if the household experiences a decrease in net income because of the loss of TANF, then the State agency may not continue the same food stamp benefit but must adjust the benefit for the transitional period to reflect the loss in net income. State agencies may extend the

certification period of households leaving TANF for up to three months in order to provide transitional benefits except that the State agency may not extend a household's certification period beyond the maximum allowable for a household of its circumstances in accordance with 7 CFR 273.10(f).

During the transitional period, the household has no reporting requirement. If it chooses to report a change in circumstances, the State agency must act during the transitional period on changes that increase the household's benefit amount. For changes that would lower the household's benefit, the State agency must make those changes effective the month after the transitional period ends.

The State agency must issue food stamp households leaving TANF a "Transition Notice" (TN) that advises the household of the following:

- Because of the closure of cash assistance, the State agency must reevaluate the household's food stamp case no more than 3 months from the effective date of the TANF case closing;
- The household's food stamp benefit amount will remain the same as when it was receiving cash assistance for up to three months (or that the State agency has adjusted the food stamp benefit amount if the household's income is decreasing as the result of leaving cash assistance);

- The household is not required to report or provide verification for changes in household circumstances during the transitional period. The TN will specify the date on which the household must resume reporting.

Before the end of the transitional period, the State agency must issue the household a written request for contact (RFC) in accordance with 7 CFR 273.12(c)(3). The RFC advises the household of the verification it must provide or the actions it must take to clarify its circumstances.

At the end of the transitional period, the State agency performs one of the following actions:

- Closes the household's food stamp case if the household is no longer eligible for the program;
- Adjusts the household's benefit level if the household remains eligible. The State agency may also extend the household's certification period in accordance with 7 CFR 273.10(f)(5);
- Recertifies the household in accordance with 7 CFR 273.14 if the household has reached the maximum number of months in its certification period during the transition period; or
- Closes the case if the household has not provided sufficient information to determine its continuing eligibility.

A State agency electing to provide transitional benefits must provide such benefits, at a minimum, to all households with earnings who leave TANF. The State agency may not provide transitional benefits to a household which is leaving TANF when:

- The State agency has determined that the household is noncompliant with TANF requirements and the State agency is imposing a comparable food stamp sanction in accordance with 7 CFR 273.11;
- The State agency has determined that the household has violated a food stamp work requirement in accordance with 7 CFR 273.7;
- The State agency has determined that a household member has committed an intentional Program violation in accordance with 7 CFR 273.16, or the State agency is closing the household's TANF case in response to information indicating the household failed to comply with food stamp reporting requirements.

Section 4115 of FSRIA amends Section 11 of the Act to add a transitional benefits provision (7 U.S.C. 2020(5)). This new statutory provision incorporates the current regulatory option but expands its scope in significant ways.

First, Section 4115 lengthens the transitional period from up to three months to up to five months. In addition, the new provision permits State agencies to extend the household's certification period beyond the limits established in 7 CFR 273.10(f) to provide the household with up to a full five months of transitional benefits. For example, under current regulations a household in a 12-month certification period that leaves TANF in the tenth month of its food stamp certification period may only receive two months of transitional benefits; *i.e.*, until the end of its food stamp certification period. Under the expanded Section 4115 provision, the State agency may extend the household's food stamp certification period an additional three months in order to provide the household with up to a full five months of transitional benefits.

Second, during the transitional period households will receive the same benefit that they received in the month prior to loss of TANF, adjusted for any reduction in income due to the loss of TANF. However, Section 4115 also grants State agencies the option of adjusting the household's benefit in the transitional period to take into account changes in circumstances that it learns of from another program in which the household participates.

Third, the household has the option of applying for recertification at any time during the transitional period. Thus, if a household applies for recertification during the first month of its transitional period and is determined eligible, the State agency must terminate transitional benefits, assign the household a new certification period, and begin issuing new benefits.

Fourth, if the household does not apply for recertification during the transitional period, Section 4115 provides the State agency the option in the final month of the transitional period to shorten the household's certification period and require the household to undergo recertification.

Finally, Section 4115 modifies the types of households who are ineligible for transitional benefits. Under Section 4115, the following households are ineligible to receive transitional benefits:

- Households leaving TANF due to a TANF sanction;
- Households who are members of any category of households designated by the State agency as ineligible for transitional benefits; or

- Households in which all members are ineligible to receive food stamps under Section 6 (7 U.S.C. 2015) of the Act. A household may be ineligible under section 6 for any of the following reasons:

- Disqualified for intentional program violation;
- Ineligible for failure to comply with a work requirement;
- An SSI recipient in a cash out state;
- An ineligible student;
- An ineligible alien;
- Fails to provide information necessary for making determination of eligibility or for completing any subsequent review of its eligibility;
- Ineligible because it knowingly transferred resources for the purpose of qualifying or attempting to qualify for the program;
- Has been sanctioned in accordance with 7 CFR 273.11(k) for failure to perform an action under Federal, State or local law relating to a means-tested public assistance program;
- Disqualified for receipt of multiple food stamps;
- Disqualified for being a fleeing felon;
- At State option, ineligible for failing to cooperate with child support agencies;
- At State option, ineligible for being delinquent in court ordered child support; or
- Able-bodied adults without dependents (ABAWDs) who fail to comply with the program's ABAWD work requirement.

The Department is proposing to amend current regulations at 7 CFR 273.12(f)(4) to implement the new requirements.

The Department is proposing to amend the introductory paragraph at 7 CFR 273.12(f)(4) by designating it as 7 CFR 273.12(f)(4)(i). We propose to further amend the paragraph by eliminating the requirement that transitional benefits be provided, at a minimum, to all households with earnings who leave TANF. Beyond those households disqualified by statute, State agencies have unqualified authority under Section 4115 to designate the categories of households eligible for transitional benefits. We are also proposing to amend the paragraph to require State agencies that choose to provide transitional benefits to indicate in their state plan that they are providing such benefits and to specify the categories of households eligible for such benefits and the maximum number of months for which transitional benefits will be provided.

We are also proposing to amend the paragraph to update the list of households that are ineligible for transitional benefits to reflect the requirements of Section 4115. As noted above, Section 4115 makes households ineligible for transitional benefits if they are ineligible to receive food stamps under Section 6 of the Act. Because Section 4115 refers to ineligible households rather than ineligible household members, the Department interprets this provision as applying only when the entire household is ineligible under Section 6. A household with an ineligible member is still eligible for transitional benefits if the remaining members of the household are eligible for food stamps. State agencies must follow the normal procedures in 7 CFR 273.11(c) to exclude ineligible members from the calculation of transitional benefits.

Some State agencies have inquired whether the transitional benefit option is limited to formerly "pure" TANF households, *i.e.*, households in which all members received TANF. Neither Section 4115 nor current regulations specify whether the transitional benefit option is only available to formerly pure TANF households or whether State agencies may also provide transitional benefits to mixed households, *i.e.*, households in which only some members were receiving TANF. The Department believes that since Section 4115 does not limit the transitional benefit option to only formerly pure TANF households, State agencies should have the option to provide such benefits to formerly mixed TANF

households as well. The Department is proposing to specify in revised 7 CFR 273.12(f)(4)(i) that the State agency has the option of providing transitional benefits to mixed TANF households.

The Department is proposing to add a new 7 CFR 273.12(f)(4)(ii) which will remind State agencies that they must follow the procedures at 7 CFR 273.12(f)(3) to determine the continued eligibility and benefit levels of households leaving TANF who are denied transitional benefits. Current rules at 7 CFR 273.12(f)(3) prohibit the State agency from terminating a household's food stamp benefit when the household loses TANF eligibility without a separate determination that the household fails to meet the Food Stamp Program's eligibility requirements.

The Department is proposing to renumber current paragraph 7 CFR 273.12(f)(4)(i) as (f)(4)(iii). The Department is also proposing to make several amendments to the requirements of the paragraph. First, we are amending the paragraph to change the length of the transitional period from up to 3 months to up to 5 months. Second, we are amending the paragraph to note that in addition to adjusting the household's food stamp benefit amount before initiating the transition period to account for decreases in income due to the loss of TANF, the State agency may also adjust the benefit to account for changes in household circumstances that it learns from another program in which the household participates. Section 4115 does not address whether the benefit can be adjusted to account for changes learned from another program only at the beginning of the transitional period or if the benefit can be adjusted at any time during the period. To provide maximum flexibility to State agencies, the Department is proposing that the State agency be permitted to adjust the household's transitional benefit at any time during the transitional period to account for changes in household circumstances that it learns from another program in which the household participates. Finally, the Department is removing the prohibition on extending the household's certification period beyond the maximum periods specified in 7 CFR 273.10(f)(1) and (f)(2) so that the State agency may extend the household's certification period up to five months in order to provide the household with up to a full five months of transitional benefits.

The Department is proposing to add a new 7 CFR 273.12(f)(4)(iv) to address a question raised by a State agency. The State agency asked whether, in

providing transitional benefits to a household, it could shorten the household's food stamp certification period when the household leaves TANF and assign the household a new certification period that conforms with the transitional period. We do not find any bar to such a procedure in Section 4115, which allows State agencies to require households to undergo a recertification at the end of their transitional period. In fact, such a procedure could simplify implementation of transitional benefits, thus encouraging more State agencies to provide the benefits to households. However, the procedure would have to be seamless to households to avoid compromising the very purpose of the transitional benefit option, which is to allow the household to continue receiving food stamp benefits for several months after leaving TANF without having to undergo a recertification. Therefore, the Department is proposing to include in 7 CFR 273.12(f)(4) a provision allowing the State agency, when the household becomes eligible for transitional benefits, to shorten the household's certification period and assign the household a new certification period that corresponds with the transitional period. All recertification requirements that would normally apply when the household's certification period is ended, such as the requirement to submit a new application and undergo an interview, would be postponed to the end of the new certification period. The State agency would not have to issue a notice of adverse action when the household's certification period is shortened, but would have to specify in the transitional notice that the household must be recertified at the end of the transitional benefit period or if it returns to TANF during the transitional period. All of the requirements governing transitional benefits laid out in this section would continue to apply to the State agency and to the household.

The Department is proposing to add a new 7 CFR 273.12(f)(4)(v). In this paragraph, the Department would include the provision that a household may apply for recertification at any time during the transitional period. The Department is proposing that the State agency observe the following procedures when a household submits a request for recertification prior to the last month of its transitional benefit period:

- The State agency must schedule an interview in accordance with 7 CFR 273.2(e);
- The State agency must provide the household with a notice of required

verification in accordance with 7 CFR 273.2(c)(5) and provide the household a minimum of 10 days to provide the required verification.

- If the household fails to undergo an interview or submit required verification within the timeframes established by the State in accordance with the previous two sentences, or the household is determined to be ineligible for the program, the State agency will deny the household's application for recertification and continue the household's transitional benefits to the end of the transitional benefit period, at which time the State agency will either recertify the household or send an RFC, as discussed below;

- If the household is determined eligible for the program, its new certification period will begin with the first day of the month following the first day of the month in which the household submitted the application for recertification, and the State agency would issue the household full benefits for that month. For example, if the household applied for recertification on the 25th day of the third month of a five-month transitional period, and the household is determined eligible for the regular Food Stamp Program, the State agency would begin the household's new certification period on the first day of what would have been the fourth month of the transitional period.

- If the household is determined eligible for the regular Food Stamp Program but is entitled to a benefit lower than its transitional benefit, the State agency must encourage the household to withdraw its application for recertification and continue to receive transitional benefits for the full transitional period. If the household chooses not to withdraw its application, the State agency must complete the recertification process and issue the household the lower benefit effective with the first month of the new certification period.

- Applications for recertification submitted in the final month of the transitional period would be processed in accordance with current regulations at 7 CFR 273.14.

The Department is proposing to renumber 7 CFR 273.12(f)(4)(ii) as (f)(4)(vi). The Department proposes to maintain the existing requirement that the State agency issue a transition notice to households that are receiving transitional benefits. However, the Department is proposing to modify the contents of the notice. First, the notice must inform the household of its eligibility for transitional benefits and the length of its transitional period.

Second, the notice must inform the household that it has a right to apply for recertification at any time during the transitional period. The Department suggests, but will not require, that the State agency send the household an application for recertification along with the transition notice or print on the notice the Internet address for the application if the State agency maintains a web page. The notice must also explain that if the household does not apply for recertification during the transitional period, at the end of the transitional period the State agency must either reevaluate the household's food stamp case or require the household to undergo a recertification. Third, the notice must explain any changes in the household's benefit due to the loss of TANF income and/or changes in household circumstances learned of from another State or Federal means-tested assistance program. Fourth, the notice must explain that the household is not required to report or verify changes in household circumstances until the deadline established in a written RFC sent by the State agency to the household pursuant to 7 CFR 273.12(c)(3), or the household's recertification interview.

The Department is proposing to renumber current paragraph 7 CFR 273.12(f)(4)(iii) as (f)(4)(vii). Section 273.12(f)(4)(iii) currently addresses the State agency's requirement to act on changes in circumstances that the household reports during its transitional period. Current rules at 7 CFR 273.12(f)(4)(ii) require the State agency to notify the household through the transition notice that it may report during the transition period if its income decreases or its expenses or household size increases. Section 273.12(f)(4)(iii) requires that if a household reports a change during the transitional period that would increase its benefit, the State agency must act on the change during the transitional period. However, if the household reports a change that would decrease its benefit, the State agency must not act on the change until after the transitional period has ended.

Section 4115 requires that the household's benefit during the transitional period be equal to the benefit it was receiving in the month preceding termination of TANF, adjusted for the loss of TANF income and, at the State agency's option, changes in household circumstances that the State agency learned of from another program in which the household participates. The Conference Report states that the household's benefit in the transitional period shall

not be adjusted "for any other changes in circumstances that could increase household benefits and which the household may report." H.R. Conf. Rep. No. 107-424, at 526 (2002). The Conference Report's language on increasing a household's benefit during the transitional period due to reported changes in circumstances is consistent with Section 4115's provision permitting a household to apply for recertification at any time during the transitional period. Thus, if a household experiences a change during the transitional period that would increase its benefit, Section 4115 allows the household to apply for recertification rather than report the change.

The Department believes that requiring the State agency to act on any reported changes in circumstances during a household's transitional period defeats the intent of the transitional benefit, which is to provide the household for a fixed number of months with the same benefit it received prior to termination of TANF, with the benefit adjusted only for the loss of TANF income and, at State agency option, other changes that the State agency learns of from the household's participation in another program. In addition, the household is protected from being denied increased benefits by having the option of applying for recertification at any time during the transitional period. Therefore the Department is proposing to remove the requirement at 7 CFR 273.12(f)(4)(ii) that the State agency notify the household through the transition notice that it may report during the transition period if its income decreases or its expenses or household size increases, and the requirement at 7 CFR 273.12(f)(4)(iii) that the State agency act on changes during the transitional period that would increase household benefits.

Because participating food stamp households are not accustomed to applying for recertification prior to the end of their certification period, the Department is concerned that many households, unless clearly informed otherwise, will report a change in circumstances during the transitional period instead of applying for recertification, thus possibly losing the opportunity to get an immediate increase in benefits. Therefore, the Department is proposing to further amend the transition notice requirements at 7 CFR 273.12(f)(4)(ii) (now (f)(4)(vi)) to require that the notice clearly inform households that if they experience a decrease in income or an increase in expenses or household size

during the transition period, they should apply for recertification.

The Department is proposing that the State agency be required to act on one change in a household's circumstances if it occurs during the transitional period. If a member of a household receiving transitional benefits moves out of the household during the transitional period and either reappears as a new household or is reported as a new member of another household, the Department is proposing that the State agency be required to remove that member from the original household and adjust the household's benefit to reflect the new household size. This action is necessary to prevent duplicate participation by the member that has left the household receiving transitional benefits, and is the same procedure that the State agencies follow in the regular program when a household member moves from one participating household to another.

Finally, the Department is proposing to renumber current paragraph 7 CFR 273.12(f)(4)(iv) as (f)(4)(viii). The new paragraph will provide the State agency two options for moving the household out of the transitional period. First, in accordance with current rules at 7 CFR 273.12(f)(4)(iv), the State agency may issue the household an RFC and act on any information it has about the household's new circumstances in accordance with 7 CFR 273.12(c)(3). Under this option, the State agency may extend the household's certification period in accordance with 7 CFR 273.10(f)(5) unless the household's certification period has already been extended passed the maximum period specified in 7 CFR 273.10(f) in order to provide the household the full transitional benefit for which it is eligible. Alternatively, in accordance with Section 4115, the State agency may recertify the household in accordance with 7 CFR 273.14. If the household has not reached the maximum number of months in its certification period during the transitional period, the State agency may shorten the household's prior certification period in order to recertify the household. In shortening the household's certification period, the State agency must send the household a notice of expiration in accordance with 7 CFR 273.14(b). The Department does not believe that a notice of adverse action is necessary to shorten the household's certification period under these circumstances. Section 11(e)(10) of the Act (7 U.S.C. 2020(e)(10)) requires that the State agency provide a notice of adverse action to the household before taking action to reduce or terminate the household's benefits during the

household's certification period. The notice of adverse action provides the household with time to file a fair hearing request to challenge the State agency's action. However, because Section 4115 authorizes State agencies to shorten a household's certification period in the final month of its transitional benefit period, the household could not effectively challenge the State agency's decision to shorten its certification period. The Department is proposing to amend current regulations at 7 CFR 273.10(f)(4) to indicate that when shortening a household's certification period in order to recertify the household at the end of its transitional benefit period, the State agency must issue a notice of expiration to the household rather than a notice of adverse action.

State agencies have asked the Department what procedure they should follow when a household returns to TANF during the transitional benefit period. The Department is proposing that under these circumstances a State agency apply the same procedures it would apply if the household had reached the final month of its transitional period. Thus, when the State agency learns that a household receiving transitional benefits has returned to TANF, the State agency may either issue an RFC and adjust the household's benefits based on information it has about the household's new circumstances and extend the household's certification period if it chooses, or it may shorten the household's certification period and require the household to undergo a recertification. Because the law does not authorize State agencies to shorten a household's certification period under these circumstances, the State agency would be required to issue a notice of adverse action rather than a notice of expiration, which the State agency may issue when the household reaches the end of its transitional period. However, to eliminate the delay associated with issuing a notice of adverse action, and to keep the procedure for when a household returns to TANF during the transitional benefit period consistent with the procedure for when a household reaches the end of its transitional period, the Department is proposing that the State agency be required to include in the transition notice a statement to the effect that if the household returns to TANF during the transitional benefit period, the State agency must either reevaluate the household's food stamp case or shorten the household's certification period and require it to undergo a recertification.

The Department believes that this advanced notification that the State agency may shorten the household's food stamp certification period if it returns to TANF during the transition period is a sufficient substitute for the notice of adverse action. The new requirements will be contained in 7 CFR 273.12(f)(4)(ix).

#### Implementation

All of the provisions of FSRIA addressed in this rule, except Section 4401, were effective on October 1, 2002. Section 4401 has 3 different implementation dates. The provision restoring food stamp eligibility to qualified aliens who are otherwise eligible and who are receiving disability benefits regardless of date of entry was effective on October 1, 2002. The provision restoring food stamp eligibility to qualified aliens who are otherwise eligible and who have lived in the U.S. for 5 years as a qualified alien beginning on date of entry was effective April 1, 2003. The provision restoring food stamp eligibility to qualified aliens who are otherwise eligible and who are under 18 regardless of date of entry and the provision eliminating the sponsor deeming requirements for immigrant children were both effective October 1, 2003.

The Department is proposing that the changes made by this rule would be effective and implemented no later than the first day of the month 180 days after publication of the final rule.

#### List of Subjects

##### 7 CFR Part 272

Alaska, Civil rights, Food stamps, Grant programs-social programs, Penalties, Reporting and recordkeeping requirements.

##### 7 CFR Part 273

Administrative practice and procedure, Aliens, Claims, Employment, Food stamps, Fraud, Government employees, Grant programs-social programs, Income taxes, Reporting and recordkeeping requirements, Students, Supplemental Security Income, Wages.

Accordingly, 7 CFR Parts 272 and 273 are proposed to be amended as follows:

1. The authority citation for parts 272 and 273 continues to read as follows:

**Authority:** 7 U.S.C. 2011–2036.

#### PART 272—REQUIREMENTS FOR PARTICIPATING STATE AGENCIES

2. In § 272.2, a new paragraph (d)(1)(xvi) is added to read as follows:

##### § 272.2 Plan of operation.

\* \* \* \* \*

(d) \* \* \*

(1) \* \* \*

(xvi) If the State agency chooses to implement the optional provisions specified in:

(A) Sections 273.2(f)(1)(xii), 273.2(f)(8)(i)(A), 273.9(d)(5), 273.9(d)(6)(i), and 273.12(a)(4) of this chapter, it must include in the Plan's attachment the options it has selected;

(B) Section 273.8(e)(19) of this chapter, it must include in the Plan's attachment a statement that the option has been selected and a description of the resources being excluded under the provision;

(C) Section 273.9(c)(3) of this chapter, it must include in the Plan's attachment a statement that the option has been selected and a description of the types of educational assistance being excluded under the provision;

(D) Section 273.9(c)(18) of this chapter, it must include in the Plan's attachment a statement that the option has been selected and a description of the types of payments being excluded under the provision;

(E) Section 273.9(c)(19) of this chapter, it must include in the Plan's attachment a statement that the option has been selected and a description of the types of income being excluded under the provision;

(F) Section 273.12(a)(5) of this chapter, it must include in the Plan's attachment a statement that the option has been selected and a description of the types of households to whom the option applies;

(G) Section 273.12(c) of this chapter, it must include in the Plan's attachment a statement that the option has been selected and a description of the deductions affected; and

(H) Section 273.12(f)(4)(i) of this chapter, it must include in the Plan's attachment a statement that the option has been selected and specify the categories of households eligible for transitional benefits and the maximum number of months for which such benefits will be provided.

\* \* \* \* \*

## PART 273—CERTIFICATION OF ELIGIBLE HOUSEHOLDS

### 3. In § 273.2:

a. Paragraph (c)(3) is amended by adding three new sentences after the second sentence.

b. Paragraph (f)(1)(xii) is amended by adding three new sentences after the third sentence.

c. Paragraph (f)(8)(i)(A) is amended by adding two new sentences after the fourth sentence and is further amended by removing in the new seventh

sentence the words "The State agency shall require a household eligible for the child support deduction" and adding in their place the words "For all other households eligible for the child support deduction or exclusion, the State agency shall require the household". The additions read as follows:

### § 273.2 Office operations and application processing.

\* \* \* \* \*

(c) \* \* \*

(3) \* \* \* If the State agency maintains a web page, it must make the application available on the web page in each language in which the State agency makes a printed application available. The State agency must provide on the web page the addresses and phone numbers of all State food stamp offices and a statement that the household should return the application form to its nearest local office. The applications must be accessible to persons with disabilities in accordance with Section 504 of the Rehabilitation Act of 1973, Pub. L. 93-112, as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 29 U.S.C. 794.

\* \* \*

\* \* \* \* \*

(f) \* \* \*

(1) \* \* \*

(xii) \* \* \* For households that pay their child support exclusively through their State CSE agency, the State agency may rely solely on information provided by that agency in determining a household's legal obligation to pay child support, the amount of its obligation and amounts the households has actually paid. Before the State agency may use the CSE agency's information, the household must sign a statement authorizing release of the household's child support payment records to the State agency. State agencies that choose to rely solely on information provided by their state CSE agency in accordance with this paragraph (f)(1)(xii) must specify in their state plan of operation that they have selected this option.

\* \* \*

\* \* \* \* \*

(8) \* \* \*

(i) \* \* \*

(A) \* \* \* For households eligible for the child support deduction or exclusion, the State agency may rely solely on information provided by the State CSE agency in determining the household's legal obligation to pay child support, the amount of its obligation and amounts the household has actually paid if the household pays its child support exclusively through its State CSE agency and has signed a statement

authorizing release of its child support payment records to the State agency. State agencies that choose to rely solely on information provided by their state CSE agency in accordance with this paragraph (f)(8)(i)(A) must specify in their state plan of operation that they have selected this option. \* \* \*

\* \* \* \* \*

### 4. In § 273.4:

a. Paragraphs (a)(5)(ii)(B) through (a)(5)(ii)(F) are amended by removing the second sentence of each paragraph.

b. Paragraph (a)(5)(ii)(H) is amended by removing the words "on August 22, 1996, was lawfully residing in the U.S., and is now" and adding in their place the word "is."

c. Paragraph (a)(5)(ii)(J) is amended by removing the words "on August 22, 1996, was lawfully residing in the U.S. and is now" and adding in their place the word "is."

d. A new paragraph (a)(5)(ii)(K) is added.

e. Paragraph (a)(6) is amended by removing the reference "(a)(5)(ii)(H) through (a)(5)(ii)(J)" and adding in its place the reference "(a)(5)(ii)(I)".

f. Paragraph (c)(2)(v) is amended by adding a new sentence to the end of the paragraph.

g. Paragraph (c)(3)(iv) is amended by adding two new sentences after the first sentence and is further amended by removing the semi-colon at the end of the last sentence and adding in its place a period, and by adding three sentences to the end of the paragraph.

h. A new paragraph (c)(3)(vi) is added.

The additions read as follows:

### § 273.4 Citizenship and alien status.

(a) \* \* \*

(5) \* \* \*

(ii) \* \* \*

(K) An alien who has resided in the U.S. as a qualified alien as defined in paragraph (a)(5)(i) of this section for 5 years.

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \*

(v) \* \* \* The State agency must use

the same procedure to determine the amount of deemed income and resources to exclude in the case of a sponsored alien who is exempt from deeming in accordance with paragraph (c)(3)(vi) of this section.

(3) \* \* \*

(iv) \* \* \* Prior to determining whether an alien is indigent, the State agency must explain the purpose of the determination to the alien and/or household representative and provide the alien and/or household

representative the opportunity to refuse the determination. If the household refuses the determination, the State agency will not complete the determination and will deem the sponsor's income and resources to the alien's household in accordance with paragraph (c)(2) of this section. \* \* \* State agencies may develop an administrative process under which information about the sponsored alien is not shared with the Attorney General or the sponsor without the sponsored alien's consent. The State agency must inform the sponsored alien of the consequences of failure to provide such consent. If the sponsored alien fails to provide consent, he or she shall be ineligible pursuant to paragraph (c)(5) of this section, and the State agency shall determine the eligibility and benefit level of the remaining household members in accordance with § 273.11(c).

\* \* \* \* \*

(vi) An alien under 18 years of age.

\* \* \* \* \*

5. In § 273.8:

a. Paragraph (b) is amended by adding after the words "for households including" the words "one or more disabled members or".

b. A new paragraph (e)(19) is added to read as follows:

#### **§ 273.8 Resource eligibility standards.**

\* \* \* \* \*

(e) \* \* \*

(19) At State agency option, any resources that the State agency excludes when determining eligibility or benefits for Temporary Assistance for Needy Families cash assistance as defined by 45 CFR 260.31(a)(1) and (a)(2), or medical assistance under section 1931 of the Social Security Act, (but not for programs that do not evaluate the financial circumstances of adults in the household and programs grand-fathered under section 404(a)(2) of the Social Security Act) except licensed vehicles not excluded under section 5(g)(2)(C) or (D) of the Food Stamp Act of 1977, as amended and cash on hand, amounts in any account in a financial institution that are readily available to the household, including money in checking or savings accounts, savings certificates, stocks, or bonds. The term "readily available" applies to resources, in a financial institution, that can be converted to cash in a single transaction, without going to court to obtain access or incurring a financial penalty other than loss of interest. State agencies may exclude deposits in individual development accounts (IDAs) made under written agreements that

restrict the use of such deposits to home purchase, higher education or starting a business. State agencies may also exclude deposits in individual retirement accounts (IRAs) if the terms of those accounts impose a penalty, other than forfeiture of interest, for early withdrawal. A State agency that chooses to exclude resources under this paragraph (e)(19) must specify in its State plan of operation that it has selected this option and provide a description of the resources that are being excluded.

\* \* \* \* \*

6. In § 273.9:

a. A new paragraph (c)(3)(v) is added.

b. New paragraphs (c)(17), (c)(18) and (c)(19) are added.

c. Paragraph (d)(1) is revised.

d. Paragraph (d)(2) is amended by revising the second sentence.

e. Paragraph (d)(5) is revised.

f. Paragraph (d)(6) is amended by revising the paragraph heading.

g. Paragraph (d)(6)(i) is amended by revising the first sentence and adding a new second sentence.

h. Paragraph (d)(6)(iii)(C) is amended by adding before the period in the third sentence "unless the State agency mandates use of standard utility allowances in accordance with paragraph (d)(6)(iii)(E) of this section".

i. Paragraph (d)(6)(iii)(E) is amended by removing the fifth sentence and adding four new sentences after the second sentence.

j. Paragraph (d)(6)(iii)(F) is amended by revising the first sentence and by removing the word "However" at the beginning of the second sentence.

The additions and revisions read as follows:

#### **§ 273.9 Income and deductions.**

\* \* \* \* \*

(c) \* \* \*

(3) \* \* \*

(v) At its option, the State agency may exclude any educational assistance that must be excluded under its State Medicaid rules that would not already be excluded under this section. A State agency that chooses to exclude educational assistance under this paragraph (c)(3)(v) must specify in its State plan of operation that it has selected this option and provide a description of the educational assistance that is being excluded. The provisions of paragraphs (c)(3)(ii), (c)(3)(iii) and (c)(3)(iv) of this section do not apply to income excluded under this paragraph (c)(3)(v).

\* \* \* \* \*

(17) Legally obligated child support payments paid by a household member

to or for a nonhousehold member, including payments made to a third party on behalf of the nonhousehold member (vendor payments) and amounts paid toward child support arrearages. However, at its option, the State agency may allow households a deduction for such child support payments in accordance with paragraph (d)(5) of this section rather than an income exclusion.

(18) At the State agency's option, any State complementary assistance program payments excluded for the purpose of determining eligibility under section 1931 of the Social Security Act for a program funded under Title XIX of the Social Security Act. A State agency that chooses to exclude complementary assistance program payments under this paragraph (c)(18) must specify in its State plan of operation that it has selected this option and provide a description of the types of payments that are being excluded.

(19) At the State agency's option, any types of income that the State agency excludes when determining eligibility or benefits for Temporary Assistance for Needy Families cash assistance as defined by 45 CFR 260.31(a)(1) and (a)(2), or medical assistance under section 1931 of the Social Security Act, (but not for programs that do not evaluate the financial circumstances of adults in the household and programs grand-fathered under section 404(a)(2) of the Social Security Act) except that the State agency shall not exclude wages or salaries; gross income from a self-employment enterprise, including the types of income referenced in paragraph (b)(1)(iii) of this section; benefits under Title I, II, IV, XIV or XVI of the Social Security Act, including supplemental security income (SSI) benefits, Temporary Assistance for Needy Families (TANF) benefits, and foster care and adoption payments; regular payments from a government source; worker's compensation; child support payments made to the household from a nonhousehold member; support or alimony payments made to the household from a nonhousehold member; annuities; pensions; retirement benefits; disability benefits; or old age or survivor benefits; and monies withdrawn or dividends received by a household from trust funds considered to be excludable resources under § 273.8(e)(8). Payments or allowances a household receives from an intermediary that are funded from a government source are considered payments from a government source. The State agency must exclude for food stamp purposes the same amount of income it excludes for TANF or

Medicaid purposes. A State agency that chooses to exclude income under this paragraph (c)(19) must specify in its State plan of operation that it has selected this option and provide a description of the resources that are being excluded.

(d) \* \* \*

(1) *Standard deduction.* (i) *48 States, District of Columbia, Alaska, Hawaii, and the Virgin Islands.* Effective October 1, 2002, in the 48 States and the District of Columbia, Alaska, Hawaii, and the Virgin Islands, the standard deduction for household sizes one through six shall be equal to 8.31 percent of the monthly net income standard for each household size established under paragraph (a)(2) of this section rounded to the nearest whole dollar. For household sizes greater than six, the standard deduction shall be equal to the standard deduction for a six-person household.

(ii) *Guam.* Effective October 1, 2002, in Guam, the standard deduction for household sizes one through six shall be equal to 8.31 percent of double the monthly net income standard for each household size for the 48 States and the District of Columbia established under paragraph (a)(2) of this section rounded to the nearest whole dollar. For household sizes greater than six, the standard deduction shall be equal to the standard deduction for a six-person household.

(iii) *Minimum deduction levels.* Notwithstanding paragraphs (d)(1)(i) and (d)(1)(ii) of this section, the standard deduction in any year for each household in the 48 States and the District of Columbia, Alaska, Hawaii, Guam, and the Virgin Islands shall not be less than \$134, \$229, \$189, \$269, and \$118, respectively.

(2) \* \* \* Earnings excluded in paragraph (c) of this section shall not be included in gross earned income for purposes of computing the earned income deduction, except that the State agency must count any earnings used to pay child support that were excluded from the household's income in accordance with the child support exclusion in paragraph (c)(17) of this section.

\* \* \* \* \*

(5) *Optional child support deduction.* At its option, the State agency may provide a deduction, rather than the income exclusion provided under paragraph (c)(17) of this section, for legally obligated child support payments paid by a household member to or for a nonhousehold member, including payments made to a third party on behalf of the nonhousehold

member (vendor payments) and amounts paid toward child support arrearages. Alimony payments made to or for a nonhousehold member shall not be included in the child support deduction. A State agency that chooses to provide a child support deduction rather than an exclusion in accordance with this paragraph (d)(5) must specify in its State plan of operation that it has chosen to provide the deduction rather than the exclusion.

(6) *Shelter costs.* (i) *Homeless shelter deduction.* A State agency may provide a standard homeless shelter deduction of \$143 a month to households in which all members are homeless individuals but are not receiving free shelter throughout the month. A State agency that chooses to provide a homeless household shelter deduction must specify in its State plan of operation that it has selected this option. \* \* \*

\* \* \* \* \*

(iii) \* \* \*

(E) \* \* \* If the State agency chooses to mandate use of standard utility allowances, it must provide a standard utility allowance that includes heating or cooling costs to residents of public housing units which have central utility meters and which charge the households only for excess heating or cooling costs. The State agency also must not prorate a standard utility allowance that includes heating or cooling costs provided to a household that lives and shares heating or cooling expenses with others. In determining whether the standard utility allowances increase program costs, the State agency shall not consider any increase in costs that results from providing a standard utility allowance that includes heating or cooling costs to residents of public housing units which have central utility meters and which charge the households only for excess heating or cooling costs. The State agency shall also not consider any increase in costs that results from providing a full (*i.e.*, not prorated) standard utility allowance that includes heating or cooling costs to a household that lives and shares heating or cooling expenses with others. \* \* \*

(F) If a household lives with and shares heating or cooling expenses with another individual, another household, or both, the State agency must prorate a standard that includes heating or cooling expenses among the household and the other individual, household, or both, except that the State agency shall not prorate the standard for such households if the State agency mandates use of standard utility allowances in

accordance with paragraph (d)(6)(iii)(E) of this section. \* \* \*

7. In § 273.10:

a. The introductory text of paragraph (d) is revised.

b. Paragraph (d)(8) is revised.

c. Paragraph (e)(1)(i)(B) is amended by adding a new sentence to the end of the paragraph.

d. Paragraph (e)(1)(i)(F) is revised.

e. Paragraph (f)(4) is revised.

The revisions and addition read as follows:

**§ 273.10 Determining household eligibility and benefit levels.**

\* \* \* \* \*

(d) \* \* \* Deductible expenses include only certain dependent care, shelter, medical and, at State agency option, child support costs as described in § 273.9.

\* \* \* \* \*

(8) *Optional child support deduction.* If the State agency opts to provide households with a deduction rather than an income exclusion for legally obligated child support payments in accordance with § 273.9(d), the State agency may budget such payments prospectively, in accordance with paragraphs (d)(2) through (d)(5) of this section, or retrospectively, in accordance with § 273.21(b) and § 273.21(f)(2), regardless of the budgeting system used for the household's other circumstances.

(e) \* \* \*

(1) \* \* \*

(i) \* \* \*

(B) \* \* \* If the State agency has chosen to treat legally obligated child support payments as an exclusion in accordance with paragraph (c)(17) of this section, multiply the excluded earnings used to pay child support by 20% and subtract that amount from the total gross monthly income.

\* \* \* \* \*

(F) If the State agency has chosen to treat legally obligated child support payments as a deduction rather than an exclusion in accordance with § 273.9(d)(5), subtract allowable monthly child support payments in accordance with § 273.9(d)(5).

\* \* \* \* \*

(f) \* \* \*

(4) *Shortening certification periods.* The State agency may not end a household's certification period earlier than its assigned termination date, unless the State agency receives information that the household has become ineligible, the household has not complied with the requirements of § 273.12(c)(3), or the State agency must shorten the household's certification

period to comply with the requirements of § 273.12(a)(5). Loss of public assistance or a change in employment status is not sufficient in and of itself to meet the criteria necessary for shortening the certification period. The State agency must close the household's case or adjust the household's benefit amount in accordance with § 273.12(c)(1) or (c)(2) in response to reported changes. The State agency must issue a notice of adverse action as provided in § 273.13 to shorten a participating household's certification period in connection with imposing the simplified reporting requirement. The State agency may not use the Notice of Expiration to shorten a certification period, except that the State agency must use the notice of expiration to shorten a household's certification period when the household is receiving transitional benefits under § 273.12(f)(4), has not reached the maximum allowable number of months in its certification period during the transitional period, and the State agency has chosen to recertify the household in accordance with § 273.12(f)(4)(vi)(B).

\* \* \* \* \*

8. In § 273.11:

a. Paragraph (c)(1)(ii) is amended by redesignating paragraphs (c)(1)(ii)(B) and (c)(1)(ii)(C) as (c)(1)(ii)(C) and (c)(1)(ii)(D), respectively, and adding a new paragraph (c)(1)(ii)(B).

b. Paragraph (c)(2)(iv) is amended by redesignating paragraphs (c)(2)(iv)(B) and (c)(2)(iv)(C) as paragraphs (c)(2)(iv)(C) and (c)(2)(iv)(D), respectively, and adding a new paragraph (c)(2)(iv)(B).

The additions read as follows:

**§ 273.11 Action on households with special circumstances.**

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

(ii) \* \* \*

(B) Assigning a standard deduction to the household;

\* \* \* \* \*

(2) \* \* \*

(iv) \* \* \*

(B) Assigning a standard deduction to the household;

\* \* \* \* \*

9. In § 273.12:

a. Paragraph (a)(1) introductory text is amended by adding a sentence after the second sentence;

b. Paragraph (a)(1)(vi) is amended by adding a new sentence to the end of the paragraph;

c. Paragraph (a)(1)(vii) is removed, and paragraph (a)(1)(viii) is redesignated as paragraph (a)(1)(vii);

d. Paragraph (a)(4) introductory text is amended by removing the first sentence and adding three new sentences to the beginning of the paragraph.

e. Paragraphs (a)(5) and (a)(6) are redesignated as paragraphs (a)(6) and (a)(7), respectively, and a new paragraph (a)(5) is added;

f. Newly redesignated paragraph (a)(6) introductory text is amended by removing the first sentence and by adding in its place two new sentences;

g. A new paragraph (b)(1)(vi) is added;

h. Paragraph (b)(2) is revised;

i. The introductory text of paragraph (c) is amended by:

1. Removing the word "shall" in the second sentence and adding in its place the word "may";

2. Removing the word "However," at the beginning of the fourth sentence; and

3. Adding seven new sentences after the first sentence.

j. Paragraph (f)(4) is revised.

The revisions and additions read as follows:

**§ 273.12 Requirements for change reporting households.**

(a) \* \* \*

(1) \* \* \* Simplified reporting households are subject to the procedures as provided in paragraph (a)(5) of this section. \* \* \*

\* \* \* \* \*

(vi) \* \* \* However, the State agency may remove this reporting requirement if it has chosen to rely solely on information provided by the State's CSE agency in determining a household's legal obligation to pay child support, the amount of its obligation, and amounts the household has actually paid in accordance with § 273.2(f)(1)(xii).

\* \* \* \* \*

(4) For households eligible for the child support exclusion at § 273.9(c)(17) or deduction at § 273.9(d)(5), the State agency may rely solely on information provided by the State CSE agency in determining the household's legal obligation to pay child support, the amount of its obligation and amounts the household has actually paid if the household pays its child support exclusively through its State CSE agency and has signed a statement authorizing release of its child support payment records to the State agency. State agencies that choose to rely solely on information provided by their State CSE agency in accordance with this paragraph (a)(4) must specify in their State plan of operation that they have selected this option. If the State agency chooses not to rely solely on information provided by its State CSE agency, the State agency may require the

household to report child support payment information on a change report, a monthly report, or a quarterly report. \* \* \*

\* \* \* \* \*

(5) The State agency may establish a simplified reporting system in lieu of the change reporting requirements specified under paragraph (a)(1) of this section. The following requirements are applicable to simplified reporting systems:

(i) *Included households.* The State agency may include any household certified for at least 4 months within a simplified reporting system. The State agency may not require households with no earned income in which all adult members are elderly or disabled, migrant or seasonal farm worker households, or households in which all members are homeless individuals to submit periodic reports in connection with the simplified reporting requirement. The certification periods of such households must be at least 4 months, but not more than 6 months.

(ii) *Notification of simplified reporting requirement.* The State agency must notify households of the simplified reporting requirements, including the consequences of failure to file a report, at initial certification, recertification, and whenever the State agency transfers the household to simplified reporting during a certification period.

(iii) *Periodic report.* (A) Except for households exempt from periodic reporting in accordance with paragraph (a)(5)(i) of this section, the State agency may require a household exempt from change reporting requirements in accordance with paragraph (a)(5)(i) of this section to submit a periodic report on its circumstances from once every 4 months up to once every 6 months. The State agency need not require a household certified for 6 months or less to submit a periodic report during its certification period. However, a household certified for more than 6 months must submit a periodic report at least once every 6 months.

(B) The periodic report form must request from the household information on any changes in circumstances in accordance with paragraphs (a)(1)(i) through (a)(1)(vii) of this section.

(C) If the household files a complete report resulting in reduction or termination of benefits, the State agency shall send an adequate notice, as defined in § 271.2 of this chapter. The notice must be issued so that the household will receive it no later than the time that its benefits are normally received. If the household fails to provide sufficient information or

verification regarding a deductible expense, the State agency will not terminate the household, but will instead determine the household's benefits without regard to the deduction.

(D) If a household fails to file a complete report by the specified filing date, the State agency will send a notice to the household advising it of the missing or incomplete report no later than 10 days from the date the report should have been submitted. If the household does not respond to the notice, the household's participation shall be terminated. The State agency may combine the notice of a missing or incomplete report with the adequate notice of termination described in paragraph (a)(5)(iii)(C) of this section.

(E) The periodic report form shall be the sole reporting requirement for any information that is required to be reported on the form, except that a household required to report less frequently than quarterly shall report when its monthly gross income exceeds the monthly gross income limit for its household size in accordance with paragraph (a)(5)(iv) of this section, and able-bodied adults subject to the time limit of § 273.24 shall report whenever their work hours fall below 20 hours per week, averaged monthly.

(iv) *Reporting when gross income exceeds 130 percent of poverty.* A household subject to simplified reporting in accordance with paragraph (a)(5)(i) of this section, whether or not it is required to submit a periodic report, must report when its monthly gross income exceeds the monthly gross income limit for its household size, as defined at § 273.9(a)(1). In determining household size for this paragraph (a)(5)(iv), the household shall use the household size that existed at the time of its most recent certification or recertification.

(v) *State agency action on changes reported outside of a periodic report.* The State agency must act when the household reports that its gross monthly income exceeds the gross monthly income limit for its household size. For other changes, the State agency need not act if the household reports a change for another public assistance program in which it is participating and the change does not trigger action in that other program but results in a decrease in the household's food stamp benefit. The State agency must act on all other changes reported by a household outside of a periodic report in accordance with one of the following two methods:

(A) the State agency must act on any change in household circumstances in

accordance with paragraph (c) of this section, or

(B) the State agency must act on any change in accordance with paragraph (c)(1) of this section if it would increase the household's benefits. The State agency must not act on changes that would result in a decrease in the household's benefits unless:

(1) The household has voluntarily requested that its case be closed in accordance with § 273.13(b)(12);

(2) The State agency has information about the household's circumstances considered verified upon receipt; or

(3) There has been a change in the household's PA grant, or GA grant in project areas where GA and food stamp cases are jointly processed in accord with § 273.2(j)(2).

(vi) *State plan requirement.* A State agency that chooses to use simplified reporting procedures in accordance with this section must state in its state plan of operation that it has implemented simplified reporting and specify the types of households to whom the reporting requirement applies.

(6) In accordance with § 273.10(d)(4), the State agency may rely solely on information provided by the State's Title IV-D agency in determining a household's legal obligation to pay child support, the amount of its obligation, and amounts the household has actually paid. If the State agency does not take this option but requires a household who is eligible to receive a child support exclusion or deduction in accordance with § 273.9(c)(17) or § 273.9(d)(5), respectively, to report information necessary for the expense or deduction, it may require the household to report such information on a change report, a periodic report, a monthly report or a quarterly report. \* \* \*

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(vi) If the State agency has chosen to disregard reported changes that affect some deductions in accordance with paragraph (c) of this section, a statement explaining that the State agency will not change certain deductions until the household's next recertification and identifying those deductions.

(2) The quarterly report form, including the form for the quarterly reporting of the child support obligation, and the periodic report form used in simplified reporting under paragraph (a)(2)(ii) of this section, must be written in clear, simple language, and must meet the bilingual requirements described in § 272.4(b) of this chapter. In addition the form must specify the date by which the agency must receive

the form and the consequences of submitting a late or incomplete form.

The form (or an attachment) must specify the verification the household must submit with the form, inform the household where to call for help in completing the form, and include a statement to be signed by a member of the households indicating his or her understanding that the information provided may result in reduction or termination of benefits. The form should also include a brief description of the Food Stamp Program fraud penalties. If the State agency has chosen to disregard reported changes that affect some deductions in accordance with paragraph (c) of this section, the form should include a statement explaining that the State agency will not change certain deductions until the household's next recertification and identifying those deductions.

\* \* \* \* \*

(c) \* \* \* However, if the household reports a change during the certification period, other than a change in earnings or residence, that would affect the household's eligibility for, or amount of, a deduction under § 273.9(d), the State agency may at its option disregard the change and continue to provide the household the deduction amount that was established at certification until the household's next recertification. In the case of a household assigned a 24-month certification period in accordance with § 273.10(f)(1) and (f)(2), the State agency must act on any disregarded changes reported during the first 12 months of the certification period at the required 12-month contact for elderly and disabled households and in the thirteenth month of the certification period for households residing on a reservation who are required to submit monthly reports. Changes reported during the second 12 months of the certification period can be disregarded until the household's next recertification. If the State agency chooses to act on changes that affect a deduction, it may not act on changes in only one direction, *i.e.*, changes that only increase or decrease the amount of the deduction, but must act on all changes that affect the deduction. The State agency may disregard changes reported by the household in accordance with paragraph (a)(1) of this section and changes it learns of from a source other than the household. The State agency must not disregard changes in earned income or shelter costs arising from a change in residence until the household's next recertification but must act on those changes in accordance with paragraphs (c)(1) and (c)(2) of this

section. A State agency that chooses to postpone action on reported changes in deductions in accordance with this paragraph (c) must state in its State plan of operation that it has selected this option and specify the deductions affected. \* \* \*

\* \* \* \* \*

(f) \* \* \*

(4) *Transitional Benefits Alternative.*

(i) The State agency may elect to provide households leaving TANF with transitional food stamp benefits as provided in this paragraph (f)(4). A State agency that chooses to provide transitional benefits must state in its State plan of operation that it has selected this option and specify the categories of households eligible for such benefits and the maximum number of months for which transitional benefits will be provided. The State agency may choose to limit transitional benefits to households in which all members had been receiving TANF, or it may provide such benefits to any household in which at least one member had been receiving TANF. The State agency may not provide transitional benefits to a household which is leaving TANF when:

(A) The household is leaving TANF due to a TANF sanction;

(B) The household is a member of a category of households designated by the State agency as ineligible for transitional benefits; or

(C) All household members are ineligible to receive food stamps for any of the following reasons:

(1) Disqualified for intentional program violation in accordance with § 273.16;

(2) Ineligible for failure to comply with a work requirement in accordance with § 273.7;

(3) An SSI recipient in a cash-out state in accordance with § 273.20;

(4) Ineligible student in accordance with § 273.5;

(5) Ineligible alien in accordance with § 273.4;

(6) Fails to provide information necessary for making determination of eligibility or for completing any subsequent review of its eligibility in accordance with § 273.2(d) and § 273.21(m)(1)(ii);

(7) Ineligible because it knowingly transferred resources for the purpose of qualifying or attempting to qualify for the program as provided at § 273.8(h);

(8) At State option, disqualified from food stamps for failure to perform an action under Federal State or local law relating to a means-tested public assistance program in accordance with § 273.11(k);

(9) Disqualified for receipt of multiple food stamps;

(10) Disqualified for being a fleeing felon in accordance with § 273.11(n);

(11) At State option, ineligible for failing to cooperate with child support agencies in accordance with § 273.11(o) and (p);

(12) At State option, ineligible for being delinquent in court ordered child support in accordance with 273.11(q); or

(13) Able-bodied adults without dependents who fail to comply with the requirements of § 273.24.

(ii) The State agency must use

procedures at paragraph (f)(3) of this section to determine the continued eligibility and benefit level of households denied transitional benefits under this paragraph (f)(4).

(iii) When a household leaves TANF, the State agency may freeze for up to 5 months the household's benefit amount after making an adjustment for the loss of TANF. This is the household's transition period. Before initiating the transition period, the State agency must recalculate the household's food stamp benefit amount by removing the TANF payment from the household's food stamp income. At its option, the State agency may also adjust the benefit initially and at any time during the transition period to account for changes in household circumstances that it learns from another State or Federal means-tested assistance program in which the household participates. To provide the full transitional period, the State agency may extend the certification period for up to 5 months and may extend the household's certification period beyond the maximum periods specified in § 273.10(f).

(iv) When a household leaves TANF, the State agency at its option may end the household's existing certification period and assign the household a new certification period that conforms to the transitional period. The recertification requirements at § 273.14 that would normally apply when the household's certification period ends must be postponed until the end of the new certification period. If the transition period results in a shortening of the household's certification period, the State agency shall not issue a household a notice of adverse action under § 273.10(f)(4) but shall specify in the transitional notice required under paragraph (f)(4)(v) of this section that the household must be recertified when it reaches the end of the transitional benefit period or if it returns to TANF during the transitional period.

(v) At any time during the transitional period, the household may apply for

recertification. If a household applies for recertification during its transitional period, the State agency shall observe the following procedures:

(A) The State agency must schedule an interview in accordance with § 273.2(e);

(B) The State agency must provide the household with a notice of required verification in accordance with § 273.2(c)(5) and provide the household a minimum of 10 days to provide the required verification.

(C) If the household fails to undergo an interview or submit required verification within the timeframes established by the State in accordance with paragraphs (A) and (B), or the household is determined to be ineligible for the program, the State agency will deny the household's application for recertification and continue the household's transitional benefits to the end of the transitional benefit period, at which time the State agency will either recertify the household or send an RFC in accordance with paragraph (f)(4)(vii) of this section;

(D) If the household is determined eligible for the regular Food Stamp Program but is entitled to a benefit lower than its transitional benefit, the State agency shall encourage the household to withdraw its application for recertification and continue to receive transitional benefits. If the household chooses not to withdraw its application, the State agency shall complete the recertification process and issue the household the lower benefit beginning with the first month of the new certification period.

(E) If the household is determined eligible for the program, its new certification period will begin with the first day of the month following the month in which the household submitted the application for recertification. The State agency must issue the household full benefits for that month. For example, if the household applied for recertification on the 25th day of the third month of a five-month transitional period, and the household is determined eligible for the regular Food Stamp Program, the State agency will begin the household's new certification period on the first day of what would have been the fourth month of the transitional period.

(F) If the household is eligible for the regular Food Stamp Program and entitled to benefits higher than its transitional benefits, and the State agency has already issued the household transitional benefits for the first month of its certification period, the State agency must issue the household a supplement.

(G) Applications for recertification submitted in the final month of the transitional period must be processed in accordance with current regulations at 7 CFR 273.14.

(vi) The State agency must issue a transition notice (TN) to the household that includes the following information:

(A) A statement informing the household that it will be receiving transitional benefits and the length of its transitional period;

(B) A statement informing the household that it has the option of applying for recertification at any time during the transitional period. The household must be informed that if it does not apply for recertification during the transitional period, at the end of the transitional period the State agency must either reevaluate the household's food stamp case or require the household to undergo a recertification.

(C) A statement that if the household returns to TANF during its transitional benefit period, the State agency will either reevaluate the household's food stamp case or require the household to undergo a recertification. However, if the household has been assigned a new certification period in accordance with paragraph (f)(4)(iii) of this section, the notice must inform the household that it must be recertified if it returns to TANF during its transitional period.

(D) A statement explaining any changes in the household's benefit amount due to the loss of TANF income and/or changes in household circumstances learned from another State or Federal means-tested assistance program;

(E) A statement informing the household that it is not required to report and provide verification for any changes in household circumstances until the deadline established in accordance with paragraph (c)(3) of this section or its recertification interview; and

(F) A statement informing the household that the State agency will not act on changes that the household reports during the transitional period prior to the deadline specified in paragraph (f)(4)(vi)(E) of this section and that if the household experiences a decrease in income or an increase in expenses or household size prior to that deadline, the household should apply for recertification.

(vii) If the household does report changes in its circumstances during the transition period, the State agency may at its option adjust the household's

benefit amount in accordance with paragraph (c) of this section or make the change effective the month following the last month of the transitional period. However, in order to prevent duplicate participation, the State agency must act to change the household's transitional benefit when a household member moves out of the household and either reapplies as a new household or is reported as a new member of another household.

(viii) In the final month of the transitional benefit period, the State agency must do one of the following:

(A) Issue the RFC specified in paragraph (c)(3) of this section and act on any information it has about the household's new circumstances in accordance with paragraph (c)(3) of this section. The State agency may extend the household's certification period in accordance with § 273.10(f)(5) unless the household's certification period has already been extended past the maximum period specified in § 273.10(f) in accordance with paragraph (f)(4)(iii) of this section; or

(B) Recertify the household in accordance with § 273.14. If the household has not reached the maximum number of months in its certification period during the transitional period, the State agency may shorten the household's prior certification period in order to recertify the household. When shortening the household's certification period pursuant to this section, the State agency must send the household a notice of expiration in accordance with § 273.14(b).

(ix) If a household receiving transitional benefits returns to TANF during the transitional period, the State agency shall end the household's transitional benefits and follow the procedures in paragraph (f)(4)(viii) of this section to determine the household's continued eligibility and benefits for the Food Stamp Program. However, for a household assigned a new certification period in accordance with paragraph (f)(4)(iv) of this section, the household must be recertified if it returns to TANF during its transitional period.

#### 10. In § 273.21:

a. Paragraph (f)(2)(iv) is amended by removing the words "The State agency" at the beginning of the first sentence and adding in their place the words "If the State agency chooses to act on a change in one or more deductible expenses, it"; and is further amended by adding a new

sentence at the beginning of the paragraph.

b. Paragraph (f)(2)(v) is amended by removing the words "The State agency" at the beginning of the second sentence and adding in their place the words "If the State agency chooses to act on a change in one or more deductible expenses, it";

c. A new paragraph (h)(2)(ix) is added; and

d. Paragraph (j)(1)(vii)(C) is revised. The revision and additions read as follows:

#### § 273.21 Monthly Reporting and Retrospective Budgeting (MRRB).

\* \* \* \* \*

(f) \* \* \*

(2) \* \* \*

(iv) The State agency at its option may disregard reported changes in deductible expenses, except for changes in shelter costs related to a change in residence, and continue to provide the household the deduction amount that was established at certification until the household's next recertification. \* \* \*

\* \* \* \* \*

(h) \* \* \*

(2) \* \* \*

(ix) If the State agency has chosen to disregard reported changes that affect some deductions in accordance with paragraph (j)(1)(vii)(C) of this section, include a statement explaining that the State agency will not change certain deductions until the household's next recertification and identifying those deductions.

\* \* \* \* \*

(j) \* \* \*

(1) \* \* \*

(vii) \* \* \*

(C) Deductions as billed or averaged from the corresponding budget month, including those shelter costs billed less often than monthly which the household has chosen to average, except that the State agency at its option may disregard reported changes in deductible expenses, except for changes in shelter costs related to a change in residence, and continue to provide the household the deduction amount that was established at certification until the household's next recertification.

\* \* \* \* \*

Dated: March 31, 2004.

**Eric M. Bost,**

*Under Secretary, Food, Nutrition and Consumer Services.*

[FR Doc. 04-8414 Filed 4-15-04; 8:45 am]

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# Federal Register

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**Friday,  
April 16, 2004**

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## **Part IV**

## **Department of Education**

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**Office of Vocational and Adult Education;  
Community Technology Centers Program;  
Notices**

**DEPARTMENT OF EDUCATION**

RIN 1830-ZA05

**Community Technology Centers Program**

**AGENCY:** Office of Vocational and Adult Education, Department of Education.

**ACTION:** Notice of final requirements, priorities, and selection criteria for novice and non-novice applicants for the Community Technology Centers program.

**SUMMARY:** The Assistant Secretary for Vocational and Adult Education announces final requirements, priorities, and selection criteria under the Community Technology Centers (CTC) program. The Assistant Secretary may use one or more of these requirements, priorities, and selection criteria for competitions in FY 2004 and competitions to be conducted in later years.

We establish these final requirements, priorities, and selection criteria to further the purpose of the CTC program, which is to assist eligible applicants to create or expand community technology centers that provide disadvantaged residents of economically distressed urban and rural communities with access to information technology and related training.

**EFFECTIVE DATE:** These final requirements, priorities, and selection criteria are effective May 17, 2004.

**FOR FURTHER INFORMATION CONTACT:** Karen Holliday, U.S. Department of Education, OVAE, 400 Maryland Avenue, SW., Washington, DC 20202-7110. Telephone: (202) 245-7708 or via Internet at [karen.holliday@ed.gov](mailto:karen.holliday@ed.gov).

If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1-800-877-8339.

Individuals with disabilities may obtain this document in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

**SUPPLEMENTARY INFORMATION:****Background**

The Community Technology Centers program is authorized under Title V, Part D, Subpart 11, Sections 5511-13 of the Elementary and Secondary Education Act of 1965 (ESEA) (20 U.S.C. 7263-7263b), as amended by Public Law 107-110, the No Child Left Behind Act of 2001.

The No Child Left Behind Act of 2001 is the most sweeping reform of Federal

education policy in a generation. It is designed to implement the President's agenda to improve America's public schools by: (1) Ensuring accountability for results, (2) providing unprecedented flexibility in the use of Federal funds in implementing education programs, (3) focusing on proven educational methods, and (4) expanding educational choice for parents. Since the enactment of the original ESEA in 1965, the Federal Government has spent more than \$130 billion to improve public schools. Unfortunately, this investment in education has not yet eliminated the achievement gap between affluent and lower-income students or between minority students and non-minority students. One of the purposes of the CTC program is to address these gaps by providing students with access to information technology and related training.

We published a notice of proposed requirements, priorities, and selection criteria in the **Federal Register** on February 2, 2004 (69 FR 5000).

In that notice, we discussed (on pages 5000 through 5003) our proposed requirements, priorities, and selection criteria for the FY 2004 CTC competition and competitions to be conducted in later years. Except for two changes to Priority 1, which we explain in the Analysis of Comments and Changes section, and minor editorial and technical revisions, there are no differences between the notice of proposed requirements, priorities, and selection criteria, and this notice of final requirements, priorities, and selection criteria.

**Analysis of Comments and Changes**

In response to our invitation in the notice of proposed requirements, priorities, and selection criteria, nine parties submitted comments. An analysis of the comments and of any changes in the proposed requirements, priorities, or selection criteria since we published the notice follows.

We have grouped major issues by subject. Generally, we do not address technical and other minor, non-substantive changes and suggested changes that the law does not authorize us to make under the applicable statutory authority.

**Definitions**

**Comments:** One commenter sought clarification regarding the definition of a "community-based organization" (CBO) and whether a community college is considered a CBO.

**Discussion:** Section 5512(a) of the ESEA includes among the types of applicants eligible to apply for a CTC

award a "community-based organization" and an "institution of higher education." Community colleges are considered institutions of higher education, rather than community-based organizations. Section 9101(6) of the ESEA defines a community-based organization to mean "a public or private nonprofit organization of demonstrated effectiveness that—(A) is representative of a community or significant segments of a community; and provides educational or related services to individuals in the community." Under the CTC program a community college could apply directly for an award as an "institution of higher education", but it could not otherwise serve as a "community-based organization" in an application filed by another eligible entity. For example, a community college could not play the required role of one of the entities in partnership with an applicant under Priority 1.

**Changes:** None.

**Access to Comments and Information**

**Comments:** One commenter expressed concern regarding the posting of public comments and inquired whether they are posted online or could be posted online for all to see and not just for those who can physically travel to DC to view them.

**Discussion:** The Department does not have an electronic docket system so it is not possible currently for us to post comments online in a systematic manner. We will be developing such a system in the future as part of a Federal government wide initiative on electronic rulemaking. A summary of the public comments, and our responses, are contained in this notice which will be published in the **Federal Register** and can be electronically accessed in text or Adobe Portable Document Format (PDF) on the Internet at the following site: <http://www.ed.gov/news/fedregister>.

**Changes:** None.

**Comments:** Commenters suggested that the Department make available on its Web site information concerning instructional strategies that have proven effective and evidence-based model programs that could be adopted or replicated locally in an effort to assist applicants. Another commenter also suggested that the Department consider working with intermediate organizations, whether they be state, local or regional, to better identify and target resources and technical assistance where need is greatest and to support and disseminate the good work that has already been accomplished as widely as possible.

*Discussion:* The Department's Web site provides information on practices that can improve student performance at <http://www.ed.gov/teachers/landing.jhtml?src=fp>. The Office of Vocational and Adult Education will continue to update the Web site as additional information becomes available. Through the Department's technical assistance provider, grantees can access information specific to issues surrounding CTCs at <http://www.americacconnects.net>.

*Changes:* None.

#### Matching Requirement

*Comments:* One commenter sought clarification regarding the matching requirement of cash or in-kind support of at least 50% from non-Federal sources towards total project costs. Two commenters expressed concern that some organizations and LEAs may have difficulty raising the required minimum match of \$250,000 and asked whether the Department is aware of any instances where entities had difficulties providing the required match.

*Discussion:* The statute requires that Federal funds may not be used to pay for more than 50 percent of a CTC project's total costs. As an example, if a CTC applicant requests \$250,000 in Federal funds (the mandatory minimum request) for its project, the applicant must have available or obtain at least \$250,000 in cash or in kind from non-Federal sources. Through our experience with the CTC program since 1999, we have discovered that, in order to provide significant increased access to technology at the local level, CTC projects must be adequately funded.

We believe that the minimum award threshold, coupled with the applicant's mandatory match, will ensure the applicant's ability to be effective. We have taken into account the ability of applicants to raise funds and therefore, in the notice of proposed requirements, priorities, and selection criteria, proposed to lower the minimum required match that was required in FY 2003 from \$300,000 to \$250,000 for FY 2004. We are adopting that change in this notice. Additionally, if an applicant desires to draw non-Federal funds from a variety of other resources, it could do so by entering into a group application with other eligible entities in accordance with 34 CFR 75.127–129.

*Changes:* None.

#### Use of Funds

*Comments:* One commenter asked that at least a portion of the FY 2004 funds be made available for adult education program activities that do not include a mandatory program to reach

disadvantaged secondary school students. The commenter recommended that if the Department uses absolute priorities for the FY 2004 program, some of the funding should be reserved for either proposed Priority 3 or Priority 4 programs. Additionally, another commenter suggested that the Department broaden the scope of the CTC program to include greater family involvement and learning and specifically to provide support for single parents through such areas as life skills enhancement and lifelong learning opportunities.

*Discussion:* Section 5513(a) of the ESEA requires that grant recipients use funds for “(1) creating or expanding community technology centers that expand access to information technology and related training for disadvantaged residents of distressed urban and rural communities”. Serving disadvantaged students as well as other members of the disadvantaged community is mandatory. With respect to the commenter's recommendation that funding be reserved for either proposed Priority 3 or Priority 4 should the Department use absolute priorities, we offer the following. Elsewhere in this issue of the **Federal Register**, we are publishing a notice inviting applications for new awards for this program for FY 2004 in which we establish the priorities to be used in the FY 2004 competition. To the extent that we do not use Priorities 3 and 4 in the FY 2004 competition, applicants may include services for adult learners as well as family literacy activities as part of their overall program, as long as they meet the other requirements and priorities set forth in the notice inviting applications. With respect to the commenter's suggestion to broaden the scope toward greater family involvement and learning, we agree that the family has a significant impact on the educational development of low and under-achieving students. Applicants may want to structure their project designs to include more family involvement consistent with the CTC program's statutory purpose. We cannot, however, prescribe a scope of format for family involvement that applicants must follow.

*Changes:* None.

#### Allowable Use of Funds

*Comments:* One commenter indicated that in an effort to support learning and program outreach, food purchases should be an allowable use of Federal funds at a minimum for outreach meetings, refreshments, and after-school snacks.

*Discussion:* While we recognize that there are a variety of ways to support learning and program outreach, Section 5513(b) of the ESEA does not allow Federal funds to be used for the purchase of food.

*Changes:* None.

#### Mandatory Services for High School Students

*Comments:* Several commenters expressed concerns with the requirement that projects must serve students who are entering or enrolled in grades 9 through 12. One commenter further recommended that, unless the 9th through 12th grade requirement is legislatively mandated, the Department should eliminate the requirement, as the commenter stated that “good centers” should improve the academic skills of children of all ages. As an alternative, the commenter suggested the Department have a requirement that applicants offer programs for those in the 9th through 12th grades and that their management plans be reflective of the intended program.

*Discussion:* We recognize the need to ensure that children of all ages improve their academic skills. However, we are especially concerned about issues relating to the academic achievement of high school students. As a result, through Priority 2, we may give priority to applications focused on improving the academic achievement of low-achieving high school students while not neglecting members of the disadvantaged community as a whole.

*Changes:* None.

#### Additional Credit for Past Performance

*Comments:* One commenter recommended that the priorities provide for the award of additional points to applicants that meet the requirements set forth therein and also have prior experience in implementing a CTC project. The commenter further recommended that additional or “priority” points be given to applicants that have projects in underserved areas. Under this proposal, the award of such additional points would become part of the selection criteria for the CTC program.

*Discussion:* While we recognize the value of the experience and accomplishments of previous grantees, the Department does not regard it as necessary to award extra points for past applicants. All projects funded under this program by law must serve disadvantaged residents of economically distressed communities.

*Changes:* None.

**Program Impact**

*Comments:* One commenter suggested that the Department may need to articulate more specifically the Secretary's intent for a systematic approach to enhancing and improving education through community learning while also increasing parental involvement and community participation. Similarly, the commenter suggested that it might be helpful to applicants if the Department established a general framework for evaluation and assessment of program effectiveness and impact.

*Discussion:* With regard to the commenter's concern for the Department to articulate the Secretary's intent for a systematic approach to enhancing and improving education through community learning, Priority 2 and the Need for the Project criterion under the Selection Criteria address this matter in detail. With respect to the commenter's request for the Department to establish a general framework for evaluation and assessment of program effectiveness and impact, such guidance is provided to grantees by the Department through its technical assistance provider. We have further developed a set of performance measures for the program. These performance measures are provided in the notice inviting applications.

*Changes:* None.

*Comments:* One commenter expressed concern regarding the Need for the Project criterion in the selection criteria. The commenter suggested that the scope of the disadvantaged population and audience include persons with, and the families of persons with, disabilities and English as a second language needs.

*Discussion:* We agree that persons with disabilities and those for whom English is a second language may require and can benefit from services that may be offered through a CTC project. We encourage applicants to demonstrate such a need in the Need for the Project section of the application.

*Changes:* None.

*Comments:* One commenter suggested that, in an effort to reduce potential costs or increase potential benefits to applicants, the Department develop one standard online application for everyone to complete, thereby reducing the amount of paperwork.

*Discussion:* In an effort to reduce paperwork and applicant burden, we are utilizing e-Application for the CTC grant competition.

*Changes:* None.

**Eligibility**

*Comments:* We received a number of comments about eligibility under the

CTC program and the requirements of Priority 1. One commenter sought clarification regarding the wording of "partnership between a community-based organization and a local educational agency" as described in the first paragraph under Proposed Priority 1 and also asked the Department to clarify the statement "LEAs are eligible under the CTC program, but an individual public school is not an eligible applicant." Another commenter also sought clarification regarding an individual public school not being considered an eligible applicant. The commenter indicated that an individual school is just as capable as a charter or private school of fulfilling the role set forth in the educational agency partnership.

A third commenter expressed concern that an individual public high school would have access to information necessary to identify students who are most in need of academic support and to ensure that the project's goals and objectives are consistent with the CTC program. The commenter stated that this contention justifies allowing an individual school to make application for the CTC program.

*Discussion:* We take this opportunity to clarify which entities are eligible to apply for grants under this program and how eligible applicants must meet the requirements under Priority 1.

Pursuant to the statute, the following entities are eligible to submit applications for the CTC program—(a) an entity, such as a foundation, museum, library, for-profit business, public or private nonprofit organization or community-based organization (including faith-based organizations), (b) an institution of higher education, (c) a State educational agency (SEA), (d) a local educational agency (LEA), or (e) a consortium of such entities, institutions, or agencies. With respect to individual schools, under these statutory provisions, a charter school that meets its State's definition of LEA is an eligible applicant. A private school also is an eligible applicant. However, an individual public school is not an eligible applicant. Thus, although we agree that the individual public school can play an integral role in the execution of a CTC program, the law does not permit an individual public school to apply for a grant under the CTC program. Instead the law makes LEAs, rather than individual public schools, eligible applicants.

The fact that an individual public school is not eligible to apply for a grant does not mean that it cannot participate in a CTC project with an eligible applicant. We had proposed in the

notice of proposed requirements, priorities, and selection criteria to establish Priority 1—a priority for projects that included a partnership between a community-based organization (CBO) and an LEA. Based on the comments received and our own internal review, we are clarifying in Priority 1 that the partnership must be between a CBO, on the one hand, and an LEA (including a charter school that meets its State's definition of an LEA), or a public school or a private school, on the other hand. We did not intend to exclude private schools and individual public schools from this priority. Accordingly, if a CBO applies for a grant under Priority 1, its project must propose a partnership with an LEA (including a charter school that meets its State's definition of an LEA), or a public school or a private school. If an LEA (including a charter school that meets its State's definition of an LEA) or a private school applies for a grant under Priority 1, its project must propose a partnership with a CBO. Because of the general eligibility restrictions in the law, an individual public school cannot submit an application for the CTC program; its role under Priority 1 is limited solely to being a partner with a CBO under an application filed by any eligible applicant.

*Changes:* Yes. We are making these changes to Priority 1.

*Comments:* One commenter indicated that Priority 1 should not require partnerships between LEAs and CBOs, as this would stifle innovation and program effectiveness. The commenter further stated that allowing institutions to deliver effective services and programs voluntarily in partnership with one another would encourage a better informed knowledge base for "the broader field" and help to deliver on the promise of flexibility and innovation at the local level.

*Discussion:* We have determined that the participation of both CBOs and LEAs (including a charter school that meets its State's definition of an LEA), or a public school or a private school, pursuant to the clarifications we are making to Priority 1, is critical to the success of CTC projects. Many academic support programs for adolescents report that securing and maintaining a high level of student participation can be challenging. Involving CBOs in service delivery will help projects better master this challenge, such as by providing expanded outreach and support to students, joint programming, or alternative services sites that are in or near the neighborhoods where students live. LEAs (including a charter school

that meets its State's definition of an LEA), or a public school or a private school also are essential participants. Their involvement is needed to identify the students who are most in need of academic support and to ensure that the project's curriculum, assessment, and instructional practices are consistent with those of the schools the students attend.

*Changes:* None.

### Priorities

*Comments:* One commenter indicated that it was unclear in the notice of proposed requirements, priorities, and selection criteria whether the four proposed priorities are absolute priorities and how the funds would be distributed between them. The commenter also indicated that the priorities did not appear to be in alignment with the descriptions provided under the selection criteria sections, Need for the Project and Quality of the Project Design. The commenter then suggested that, if the project is to support adult learners and career development needs, the two descriptions would need to be expanded to include criteria related to the respective populations.

*Discussion:* As indicated in the notice of proposed requirements, priorities, and selection criteria, we will designate the priorities as absolute, competitive preference, or invitational in a notice inviting applications for new awards. The decision how to use them is made each year, see 34 CFR 75.105. After considering the proposed comment, the Secretary believes no action or change strengthening the priorities is necessary. The notice inviting applications for new awards for FY 2004, including the designation of priorities, is published elsewhere in this issue of the **Federal Register**.

*Changes:* None.

*Comments:* One commenter expressed concern that the focus of the CTC program should be not only on the increased academic achievement of low-achieving high school students but also on enrichment activities for high school students.

*Discussion:* Although Priority 2 focuses on increased academic achievement of low-achieving high schools, recipients also may use grant funds for academic enrichment activities pursuant to Section 5513 (b)(3)(A) of the ESEA.

*Changes:* None.

### Funding

*Comments:* One commenter recommended the Department restore its funding and programmatic scope to

a multi-year cycle that includes the award of smaller multi-year grants rather using a one-year grant cycle.

*Discussion:* While the Department recognizes that a multi-year cycle would allow additional time for grantees to implement and evaluate the effectiveness of their projects, the Department has not requested funds for the CTC program for 2005 and, therefore, does not want to commit a project to several years of funding and staffing without assurance of continued support.

*Changes:* None.

*Comments:* One commenter expressed concern regarding the set-aside designation for the novice applicants. The commenter further indicated that, although novice applicants may be first-time applicants for or recipients of Federal funding under the CTC program, they are not necessarily new entrants to the field of community technology.

*Discussion:* The Department's goal in setting aside a percentage of funding for novice applicants is to ensure that applicants with limited experience in administering Federal funds are provided an opportunity to compete for CTC funds, whatever may be their prior experience in community technology.

*Changes:* None.

### Partnering

*Comments:* One commenter expressed concern regarding the requirement concerning the minimum number of participating educational entities—including LEAs and high schools—that must be engaged. Additionally, the commenter indicated that by basing the number of CTCs involved and requiring partnership with LEAs and secondary schools, the potential to focus attention on other educational groups (including middle or elementary schools) is lessened.

*Discussion:* We recognize the importance of serving students of other grade levels; however, we are especially concerned about issues relating to the academic achievement of high school students. Therefore, we have emphasized secondary schools within Priority 2.

*Changes:* None.

### Novice Applicants

*Discussion:* As part of our internal review of the proposed priorities, we are further modifying Priority 1 to indicate that it will not apply to novice applicants. As most novice applicants are applying for Federal funding for the first time, the Department has determined that the additional time and administrative requirements of Priority

1 would be too cumbersome for novice applicants.

*Changes:* Yes. We are modifying Priority 1 to state specifically that it does not apply to novice applicants.

**Note:** This notice of final requirements, priorities, and selection criteria does *not* solicit applications. In any year in which we choose to use these requirements, priorities, and selection criteria, we invite applications through a notice in the **Federal Register**.

### Requirements

The Assistant Secretary announces the following requirements for the CTC program. These requirements are in addition to the content that all Community Technology Centers grant applicants include in their applications as required by the program statute under Title V, Part D, Subpart 11, Sections 5511–13 of the ESEA.

#### A. Targeted Applicants

One combined competition will be conducted for both non-novice and novice applicants. The Department will rank and fund the two groups separately. At least seventy-five percent of the funds will be set-aside for non-novice applicants and up to twenty-five percent will be set-aside for novice applicants.

#### B. Range of Awards

The Department establishes \$250,000 as the minimum award and \$500,000 as the maximum award. No grant application will be considered for funding if it requests an award amount outside the funding range of \$250,000 to \$500,000.

#### C. Matching Funds Requirement

Pursuant to section 5512(c) of ESEA, as amended by the No Child Left Behind Act of 2001 (NCLB), Federal funds may not be used to pay for more than 50 percent of total CTC project costs. In order to receive a grant award under the competition, each applicant must furnish from non-Federal sources at least 50 percent of its total project costs. Applicants may satisfy this requirement in cash or in kind, fairly evaluated, including services. Each applicant must provide a dollar-for-dollar match of the amount requested from the Federal Government. An example of an allowable match would be a situation in which an applicant requested \$250,000 in Federal funds (the mandatory minimum request). In that situation, the application would be required to furnish at least \$250,000 in cash or in kind from non-Federal funds, fairly evaluated, resulting in a total project cost of \$500,000.

## Discussion of Priorities

**Note:** In any year in which we choose to use one or more of these priorities, we invite applications through a notice in the **Federal Register**. When inviting applications we designate each priority as absolute, competitive preference, or invitational. The effect of each type of priority follows:

*Absolute priority:* Under an absolute priority we consider only applications that meet the priority (34 CFR 75.105(c)(3)).

*Competitive preference priority:* Under a competitive preference priority we give competitive preference to an application by either (1) awarding additional points, depending on how well or the extent to which the application meets the competitive priority (34 CFR 75.105(c)(2)(i)); or (2) selecting an application that meets the competitive priority over an application of comparable merit that does not meet the priority (34 CFR 75.105(c)(2)(ii)).

*Invitational priority:* Under an invitational priority we are particularly interested in applications that meet the invitational priority. However, we do not give an application that meets the invitational priority a competitive or absolute preference over other applications (34 CFR 75.105(c)(1)).

### Priorities

#### Priority 1

This priority supports projects by eligible applicants that include a partnership with a community-based organization, on the one hand, and a local educational agency (including a charter school that meets its State's definition of an LEA), or a public school or a private school, on the other hand. To meet the priority, an applicant must clearly identify the partnering agencies and include a detailed plan of their working relationship, including a project budget that reflects fund disbursements to the various partnering agencies. Thus, the Secretary gives priority to projects in which the delivery of instructional services includes:

1. A community-based organization (CBO), which may be a faith-based organization, and
2. A local educational agency (LEA) (including a charter school that meets its State's definition of an LEA), or a public school or a private school.

A CBO is not required to submit a joint application with its proposed partners when applying for funds; however, the proposed project must deliver the educational services in partnership with an LEA (including a charter school that meets its State's definition of an LEA), or a public school or a private school.

An LEA (including a charter school that meets its State's definition of an LEA) or a private school also is not required to submit a joint application

with a CBO when applying for funds; however, the proposed project must deliver the educational services in partnership with a CBO.

An eligible applicant, *e.g.*, an institution of higher education, that is not a CBO or an LEA (including a charter school that meets its State's definition of an LEA) or a private school must enter into a partnership that includes a CBO, on the one hand, and an LEA (including a charter school that meets its State's definition of an LEA), or a public school or a private school, on the other hand, in the delivery of educational services.

An individual public school is not eligible to submit an application under the CTC program in general due to the authorizing statute's general eligibility restrictions. However, an individual public school may be included as a partner in an eligible applicant's proposed project and application.

This priority does not apply to novice applicants. In any competition in which the Department establishes this priority as an absolute priority, novice applicants are not required to meet the requirements of this priority.

#### Priority 2

This priority supports applicants that meet the following criteria:

Applicants must state whether they are proposing a local or State project. A local project must include one or more CTCs; a State project must include two or more CTCs. In addition, the project must be coordinated with one or more LEAs (including a charter school that meets its State's definition of an LEA), or a public school or a private school that provides supplementary instruction in the core academic subjects of reading or language arts, or mathematics, to low-achieving high school students. Projects must serve students who are entering or enrolled in grades 9 through 12 and who: (1) Have academic skills significantly below grade level, or (2) have not attained proficiency on the State academic assessments conducted under Title I of the ESEA.

Supplementary instruction may be delivered before or after school or at other times when school is not in session. Instruction may also be provided while school is in session, provided that it increases the amount of time students receive instruction in core academic subjects and does not require their removal from class. The instructional strategies used must be based on practices that have proven effective for improving the academic performance of low-achieving students. If these services are not provided directly by an LEA or school, they must

be provided in coordination with an LEA or school. Each applicant must demonstrate how their project's proposed academic approach is aligned with the secondary school curricula of the school or schools in which the students to be served by the grant are entering or enrolled.

#### Priority 3

This priority supports projects whose CTC activities focus on adult education and family literacy services.

Under this priority, we give priority to projects that provide adult education and family literacy activities through technology and the Internet, including adult basic education, adult secondary education, and English literacy instruction.

#### Priority 4

This priority supports projects whose CTC activities focus on career development and job preparation activities. Under this priority we give priority to projects that provide career development and job preparation activities in high-demand occupational areas.

### Selection Criteria

The following criteria will be used to evaluate applications submitted for grants under the CTC program.

(a) Need for the Project. In evaluating the need for the proposed project, we will consider the extent to which the proposed project will:

- (1) Serve students from low-income families;
- (2) Serve students entering or enrolled in high schools (9th through 12th grades) that are among the high schools in the State that have the highest numbers or percentages of students who have not achieved proficiency on the State academic assessments required by Title I of ESEA, or who have academic skills in reading or language arts, or mathematics, that are significantly below grade level;
- (3) Serve students who have the greatest need for supplementary instruction, as indicated by their scores on State or local standardized assessments in reading or language arts, or mathematics, or some other local measure of performance in reading or language arts, or mathematics; and
- (4) Create or expand access to information technology and related training for disadvantaged residents of distressed urban or rural communities.

(b) Quality of the Project Design. In evaluating the quality of the project design, we will consider the extent to which the proposed project will adequately and effectively investigate

and incorporate in its implementation plan the following elements:

(1) Provide instructional services that will be of sufficient size, scope, and intensity to improve the academic performance of participating students;

(2) Incorporate strategies that have proven effective for improving the academic performance of low-achieving students;

(3) Implement strategies in recruiting and retaining students that have proven effective;

(4) Provide instruction that is aligned with the high school curricula of the schools in which the students to be served by the grant are entering or enrolled; and

(5) Provide high-quality, sustained, and intensive professional development for personnel who provide instruction to students.

(c) **Quality of the Management Plan.** In evaluating the quality of the management plan, we consider the extent to which the proposed project:

(1) Outlines specific, measurable goals, objectives, and outcomes to be achieved by the proposed project;

(2) Assigns responsibility for the accomplishment of project tasks to specific project personnel, and provides timelines for the accomplishment of project tasks;

(3) Requires appropriate and adequate time commitments of the project director and other key personnel to achieve the objectives of the proposed project; and

(4) Includes key project personnel, including the project director and other staff, with appropriate qualifications and relevant training and experience.

(d) **Adequacy of Resources.** In determining the adequacy of the resources for the proposed project, we consider the following factors:

(1) The adequacy of support, including facilities, equipment, supplies, and other resources, from the applicant;

(2) The extent to which a preponderance of project resources will be used for activities designed to improve the academic performance of low-achieving students in grades 9 through 12 in reading and/or mathematics;

(3) The extent to which the budget is adequate and costs are reasonable in relation to the objectives and design of the proposed project; and

(4) The potential for continued support of the project after Federal funding ends, including, as appropriate, the demonstrated commitment of appropriate entities to such support.

(e) **Quality of the Evaluation.** In determining the quality of the project

evaluation, we consider the extent to which the application:

(1) Includes a plan that utilizes evaluation methods that are feasible and appropriate to the goals and outcomes of the project;

(2) Will regularly examine the progress and outcomes of participating students on a range of appropriate performance measures and has a plan for utilizing such information to improve project activities and instruction;

(3) Will use an independent, external evaluator with the necessary background and technical expertise to assess the performance of the project; and

(4) Effectively demonstrates that the applicant has adopted a rigorous evaluation design.

#### **Executive Order 12866**

This notice of final requirements, priorities, and selection criteria has been reviewed in accordance with Executive Order 12866. Under the terms of the order, we have assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the notice of final requirements, priorities, and selection criteria are those resulting from statutory requirements and those we have determined as necessary for administering this program effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of this notice of final requirements, priorities and selection criteria, we have determined that the benefits of the final requirements, priorities, and selection criteria justify the costs.

We have also determined that this regulatory action does not unduly interfere with State, local and tribal governments in the exercise of their governmental functions.

We summarized the costs and benefits in the notice of proposed requirements, priorities, and selection criteria.

#### **Intergovernmental Review**

This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

#### **Electronic Access to This Document**

You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: [www.ed.gov/news/fedregister](http://www.ed.gov/news/fedregister).

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1-888-293-6498; or in the Washington, DC, area at (202) 512-1530.

**Note:** The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: <http://www.gpoaccess.gov/nara/index.html>.

(Catalog of Federal Domestic Assistance Number 84.341A, Community Technology Centers Program)

**Program Authority:** 20 U.S.C. 7263–7263b.

Dated: April 12, 2004.

**Susan Sclafani,**

*Assistant Secretary for Vocational and Adult Education.*

[FR Doc. 04-8659 Filed 4-15-04; 8:45 am]

**BILLING CODE 4000-01-P**

## **DEPARTMENT OF EDUCATION**

### **Office of Vocational and Adult Education; Overview Information; Community Technology Centers (CTC) Program; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2004 for Novice and Non-Novice Applicants for the Community Technology Centers Program**

*Catalog of Federal Domestic Assistance (CFDA) Number: 84.341A.*

**Dates:**

*Applications Available:* April 16, 2004.

*Deadline for Transmittal of Applications:* June 1, 2004.

*Deadline for Intergovernmental Review:* June 16, 2004.

**Eligible Applicants:** Eligible applicants shall be an entity, such as a foundation, museum, library, for-profit business, public or private nonprofit organization or community-based organization (including faith-based organizations), an institution of higher education, a State educational agency (SEA), a local educational agency (LEA) (including a charter school that meets its State's definition of an LEA), a private school, or a consortium of such entities, institutions, or agencies. To be eligible, an applicant must have the

capacity to significantly expand access to computers and related services for disadvantaged residents of economically distressed urban and rural communities who would otherwise be denied such access.

One combined competition will be conducted for both non-novice and novice applicants. The Department will rank and fund the two groups separately. At least seventy-five percent of the funds will be set aside for non-novice applicants and up to twenty-five percent will be set aside for novice applicants.

**Novice Applicants:** An applicant is considered a "novice applicant" if it meets the following definition taken from 34 CFR 75.225(a)(1):

The applicant must—

- (i) Have never received a grant or subgrant under the Community Technology Centers program;
- (ii) Have never been a member of a group application, submitted in accordance with 34 CFR 75.127–75.129, that received a grant under the Community Technology Centers program; and
- (iii) Have not had an active discretionary grant from the Federal Government in the five (5) years before the deadline date for applications in this competition.

34 CFR 75.225(a)(2) and (b) further interpret this definition in cases of group applications in this competition.

**Estimated Available Funds:** \$10,000,000. Up to 25 percent of the available funds will be set aside for novice applicants.

**Estimated Average Size of Awards:** \$350,000.

**Minimum and Maximum Award Amounts:** The minimum award amount is \$250,000 and the maximum award amount is \$500,000, for the 12-month project period. No grant application will be considered for funding if it requests an award amount outside the funding range of \$250,000 to \$500,000.

**Estimated Number of Awards:** 18–25.

**Note:** The Department is not bound by any estimates in this notice.

**Project Period:** Up to 12 months.

## Full Text of Announcement

### I. Funding Opportunity Description

**Purpose of Program:** As authorized by Title V, Part D, Subpart 11, Sections 5511–13 of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the No Child Left Behind Act of 2001 (NCLB), the purpose of the CTC program is to assist eligible applicants to create or expand community technology centers that provide disadvantaged residents of

economically distressed urban and rural communities with access to information technology and related training.

**Priorities:** These priorities are from the notice of final requirements, priorities, and selection criteria for this program, published elsewhere in this issue of the **Federal Register**.

**Absolute Priorities:** For FY 2004 these priorities are absolute priorities. Under 34 CFR 75.105(c)(3) we consider only applications that meet these priorities. *If you are not a novice applicant*, as defined elsewhere in this notice, you must meet both priorities. Your application will be declared ineligible and will not be read if you do not address both of the absolute priorities. If you are a novice applicant, you must meet at least the second priority or your application will be declared ineligible and will not be read.

These priorities are:

#### Absolute Priority 1

This priority supports projects by eligible applicants that include a partnership with a community-based organization, on the one hand, and a local educational agency (including a charter school that meets its State's definition of an LEA), or a public school or a private school, on the other hand. To meet the priority, an applicant must clearly identify the partnering agencies and include a detailed plan of their working relationship, including a project budget that reflects fund disbursements to the various partnering agencies. Thus, the Secretary gives priority to projects in which the delivery of instructional services includes:

1. A community-based organization (CBO), which may include a faith-based organization, and
2. A local educational agency (LEA) (including a charter school that meets its State's definition of an LEA), or a public school or a private school.

A CBO is not required to submit a joint application with an LEA or school when applying for funds; however, the proposed project must deliver the educational services in partnership with an LEA (including a charter school that meets its State's definition of an LEA), or a public school or a private school. An LEA (including a charter school that meets its State's definition of an LEA) or a private school also is not required to submit a joint application with a CBO when applying for funds; however, the proposed project must deliver the educational services in partnership with a CBO.

An eligible applicant, *e.g.*, an institution of higher education, that is not a CBO or an LEA (including a

charter school that meets its State's definition of an LEA) or a private school must enter into a partnership that includes a CBO, on the one hand, and an LEA (including a charter school that meets its State's definition of an LEA), or a public school or a private school, on the other hand, in the delivery of educational services.

An individual public school is not eligible to submit an application under the CTC program in general due to the authorizing statute's general eligibility restrictions. However, an individual public school may be included as a partner in an eligible applicant's proposed project and application.

This priority does not apply to novice applicants. Novice applicants are not required to meet the requirements of this priority.

#### Absolute Priority 2

This priority supports applicants that meet the following criteria:

Applicants must state whether they are proposing a local or State project. A local project must include one or more CTCs; a State project must include two or more CTCs. In addition, the project must be coordinated with one or more LEAs (including a charter school that meets its State's definition of an LEA), or a public school or a private school that provides supplementary instruction in the core academic subjects of reading or language arts, or mathematics, to low-achieving high school students. Projects must serve students who are entering or enrolled in grades 9 through 12 and who: (1) Have academic skills significantly below grade level, or (2) have not attained proficiency on State academic assessments mandated under Title I of the ESEA. Supplementary instruction may be delivered before or after school or at other times when school is not in session. Instruction may also be provided while school is in session, provided that it increases the amount of time students receive instruction in core academic subjects and does not require their removal from class. The instructional strategies used must be based on practices that have proven effective for improving the academic performance of low-achieving students. If these services are not provided directly by an LEA or school, they must be provided in coordination with an LEA or school. Each applicant must demonstrate how their project's proposed academic approach is aligned with the secondary school curricula of the school or schools in which the students to be served by the grant are entering or enrolled.

**Program Authority:** 20 U.S.C. 7263–7263b.

**Applicable Regulations:** (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 75, 77, 79, 80, 81, 82, 84, 85, 86, 97, 98, and 99; and (b) the notice of final requirements, priorities, and selection criteria, published elsewhere in this issue of the **Federal Register**.

**Note:** The regulations in part 79 apply to all applicants except federally recognized Indian tribes.

**Note:** The regulations in part 86 apply to institutions of higher education only.

## II. Award Information

**Type of Award:** Discretionary grants.

**Estimated Available Funds:**

\$10,000,000. Up to 25 percent of the available funds will be set aside for novice applicants.

**Estimated Average Size of Awards:** \$350,000.

**Minimum and Maximum Award Amounts:** The minimum award amount is \$250,000 and the maximum award amount is \$500,000, for the 12-month project period. No grant application will be considered for funding if it requests an award amount outside the funding range of \$250,000 to \$500,000.

**Estimated Number of Awards:** 18–25.

**Note:** The Department is not bound by any estimates in this notice.

**Project Period:** Up to 12 months.

## III. Eligibility Information

**1. Eligible Applicants:** Eligible applicants shall be an entity, such as a foundation, museum, library, for-profit business, public or private nonprofit organization or community-based organization (including faith-based organizations), an institution of higher education, an SEA, an LEA (including a charter school that meets its State's definition of an LEA), a private school, or a consortium of such entities, institutions, or agencies. To be eligible, an applicant must have the capacity to significantly expand access to computers and related services for disadvantaged residents of economically distressed urban and rural communities who would otherwise be denied such access.

One combined competition will be conducted for both non-novice and novice applicants. The Department will rank and fund the two groups separately. At least seventy-five percent of the funds will be set aside for non-novice applicants and up to twenty-five percent will be set aside for novice applicants.

**Novice Applicants:** An applicant is considered a "novice applicant" if it meets the following definition taken from 34 CFR 75.225(a)(1):

The applicant must—

(i) Have never received a grant or subgrant under the Community Technology Centers program;

(ii) Have never been a member of a group application, submitted in accordance with 34 CFR 75.127–75.129, that received a grant under the Community Technology Centers program; and

(iii) Have not had an active discretionary grant from the Federal Government in the five (5) years before the deadline date for applications in this competition.

34 CFR 75.225(a)(2) and (b) further interpret this definition in cases of group applications in this competition.

**2. Cost Sharing or Matching:** Pursuant to section 5512(c) of the ESEA, as amended by the NCLB, Federal funds may not be used to pay for more than 50 percent of total CTC project costs. In order to receive a grant award under the CTC competition, each applicant must furnish from non-Federal sources at least 50 percent of its total project costs. Applicants may satisfy this requirement in cash or in kind, fairly evaluated, including services. Each applicant must provide a dollar-for-dollar match of the amount requested from the Federal Government. An example of an allowable match would be a situation in which an applicant requested \$250,000 in Federal funds (the mandatory minimum request). In that situation, the applicant would be required to furnish at least \$250,000 in cash or in kind from non-Federal funds, fairly evaluated, resulting in a total project cost of \$500,000.

## IV. Application and Submission Information

**1. Address to Request Application Package:** You may obtain an electronic copy of the application package for this competition via Internet by accessing the Department's Web site at: [www.ed.gov/GrantApps](http://www.ed.gov/GrantApps). To request a paper copy of the application package, you may contact Karen Holliday, U.S. Department of Education, OVAE, 400 Maryland Avenue, SW., Washington, DC 20202–7110. Telephone: (202) 245–7708 or via Internet at: [Karen.Holliday@ed.gov](mailto:Karen.Holliday@ed.gov).

If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

Individuals with disabilities may obtain a copy of the application package in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) on request to the contact person listed in this section.

**2. Content and Form of Application Submission:** Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this program.

**Page Limit:** Please note that the program narrative of the application must not exceed the equivalent of 25 pages. The abstract and table of contents pages will not count against the 25 page limit. In addition, budget information must not exceed 5 pages (which includes one page for the ED524 form and four pages for the narrative). Appendices must be limited to 15 pages.

The selection criteria used by reviewers to evaluate your application are to be addressed in the application narrative. Applicants must limit the narrative to the equivalent of no more than 25 pages, using the following standards:

- A "page" is 8.5" × 11" on one side only, with 1" margins at the top, bottom, and both sides.
- Double space all text in the application narrative.
- Use a 12-point font.
- If you are not a novice applicant, start page numbering with your response to the first priority. Novice applicants should start page numbering with their response to the second priority.

• Applicants must limit the budget narrative to four pages and the appendices to 15 pages using the aforementioned standards.

We will reject your application if —

- You apply these standards and exceed the page limit; or,
- You apply other standards and exceed the equivalent of the page limit.

**3. Submission Dates and Times:**  
**Applications Available:** April 16, 2004.

**Deadline for Transmittal of Applications:** June 1, 2004. The dates, times and procedures for the transmittal of applications are described in paragraph 6 of this section and are in the application package for this program.

We do not consider an application that does not comply with the deadline requirements.

**Deadline for Intergovernmental Review:** June 16, 2004.

**4. Intergovernmental Review:** This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this program.

**5. Funding Restrictions:** Federal funds must be used for costs that are allowable

under the Community Technology Centers program and cannot be used for construction, food, stipends, childcare, or security personnel.

#### 6. Procedures for Submitting Applications:

##### a. Applications Submitted Electronically.

We are requiring that applications for grants under the Community Technology Centers Program—CFDA Number 84.341A be submitted electronically. The Government Paperwork Elimination Act (GPEA) of 1998 (P.L. 105–277) and the Federal Financial Assistance Management Improvement Act of 1999 (P.L. 106–107) encourage us to undertake initiatives to improve our grant processes. Enhancing the ability of individuals and entities to conduct business with us electronically is a major part of our response to these Acts. Therefore, we are taking steps to adopt the Internet as our chief means of conducting transactions in order to improve services to our customers and to simplify and expedite our business processes.

**Note:** Some of the procedures in these instructions for transmitting applications differ from those in the Education Department General Administrative Regulations (EDGAR)(34 CFR 75.102). Under the Administrative Procedure Act (5 U.S.C. 553) the Department generally offers interested parties the opportunity to comment on proposed regulations. However, these amendments make procedural changes only and do not establish new substantive policy. Therefore, under 5 U.S.C. 553(b)(A), the Secretary has determined that rulemaking is not required.

We are requiring that applications for grants under the Community Technology Centers Program—CFDA Number 84.341A be submitted electronically using the Electronic Grant Application System (e-Application) available through the Department's e-GRANTS system. The e-GRANTS system is accessible through its portal page at: <http://e-grants.ed.gov>.

If you are unable to submit an application through the e-GRANTS system, you may submit a written request for a waiver of the electronic submission requirement. In your request, you should explain the reason or reasons that prevent you from using the Internet to submit your application. Address your request to: Karen Holliday, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, DC 20202–7110. Please submit your request no later than two weeks before the application deadline date.

If, within two weeks of the application deadline date, you are

unable to submit an application electronically, you must submit a paper application by the application deadline date in accordance with the transmittal instructions described in this notice and in the application package. The paper application must include a written request for a waiver documenting the reasons that prevented you from using the Internet to submit your application.

**Pilot Project for Electronic Submission of Applications:** We are continuing to expand our pilot project for electronic submission of applications to include additional formula grant programs and additional discretionary grant competitions. The Community Technology Centers Program—CFDA Number 84.341A is one of the programs included in the pilot project. If you are an applicant under the Community Technology Centers Program, you must submit your application to us in electronic format unless a request to receive a waiver has been made pursuant to the instructions provided herein.

The pilot project involves the use of e-Application. If you use e-Application, you will be entering data online while completing your application. You may not e-mail an electronic copy of a grant application to us. The data you enter online will be saved into a database. We shall continue to evaluate the success of e-Application and solicit suggestions for its improvement.

If you participate in e-Application, please note the following:

- You must submit your grant application electronically through the Internet using the software provided on the e-Grants Web site (<http://e-grants.ed.gov>) by 4:30 p.m. (Washington, DC time) on the application deadline date. The regular hours of operation of the e-Grants Web site are 6 a.m. Monday until 7 p.m. Wednesday; and 6 a.m. Thursday until midnight Saturday (Washington, DC time). Please note that the system is unavailable on Sundays, and after 7 p.m. on Wednesdays for maintenance (Washington, DC time). Any modifications to these hours are posted on the e-Grants Web site. We strongly recommend that you do not wait until the application deadline date to initiate an e-Application package.

- You will not receive additional point value because you submit a grant application in electronic format, nor will we penalize you if you submit an application in paper format because you were prevented from submitting it electronically as required.

- You must submit all documents electronically, including the Application for Federal Education

Assistance (ED 424), the Community Technology Centers Program Grant Application Package Coversheet, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.

- Your e-Application must comply with any page limit requirements described in this notice.

- After you electronically submit your application, you will receive an automatic acknowledgement, which will include a PR/Award number (an identifying number unique to your application).

- Within three working days after submitting your electronic application, fax a signed copy of the Application for Federal Education Assistance (ED 424) cover sheet to the Application Control Center after following these steps:

1. Print ED 424 from e-Application.
2. The institution's Authorizing Representative must sign this form.
3. Place the PR/Award number in the upper right hand corner of the hard copy signature page of the ED 424.
4. Fax the signed ED 424 to the Application Control Center at (202) 260–1349.

- We may request that you give us original signatures on other forms at a later date.

**Application Deadline Date Extension in Case of System Unavailability:** If you are prevented from submitting your application on the application deadline date because the e-Application system is unavailable, we will grant you an extension of one business day in order to transmit your application electronically, by mail, or by hand delivery. We will grant this extension if—

1. You are a registered user of e-Application and you have initiated an e-Application for this competition; and

2. (a) The e-Application system is unavailable for 60 minutes or more between the hours of 8:30 a.m. and 3:30 p.m., Washington, DC time, on the application deadline date; or

- (b) The e-Application system is unavailable for any period of time during the last hour of operation (that is, for any period of time between 3:30 p.m. and 4:30 p.m., Washington, DC time) on the application deadline date.

We must acknowledge and confirm these periods of unavailability before granting you an extension. To request this extension or to confirm our acknowledgement of any system unavailability, you may contact either (1) the person listed elsewhere in this notice under For Further Information Contact (see VII. Agency Contact) or (2) the e-GRANTS help desk at 1–888–336–8930.

You may access the electronic grant application for the Community Technology Centers Program, CFDA No: 84.341A at: <http://e-grants.ed.gov>.

*b. Applications Delivered by Mail.*

An original and two copies of an application for an award must be mailed or hand-delivered by the application deadline date if you have requested a waiver of the electronic application submission requirement. We do not consider an application that does not comply with the deadline requirements.

Applications sent by mail must be addressed to: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.341A), Room 3671, Regional Office Building 3, 400 Maryland Avenue, SW., Washington, DC 20202-4725.

Applicants must show proof of mailing consisting of one of the following:

- (1) A legibly dated U.S. Postal Service Postmark;
- (2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service;
- (3) A dated shipping label, invoice, or receipt from a commercial carrier; or
- (4) Any other proof of mailing acceptable to the U.S. Secretary of Education.

If an application is sent through the U.S. Postal Service, the Secretary does not accept either of the following as proof of mailing:

- (1) A private metered postmark, or
- (2) A mail receipt that is not dated by the U.S. Postal Service.

Applicants should note that the U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

If you send your application by mail, the Application Control Center will mail a Grant Application Receipt Acknowledgment to you. If you do not receive the notification of application receipt within 15 days from the mailing of the application, you should call the U.S. Department of Education Application Control Center at (202) 708-9493.

You must indicate on the envelope and—if not provided by the Department—in Item 4 of the Application for Federal Education Assistance (ED 424 (exp. 11/30/2004)) the CFDA number—and suffix letter, if any—of the competition under which you are submitting your application.

If your application is post marked after the deadline date, we will notify you that we will not consider the application.

*c. Applications Delivered by Hand/Courier Service.*

An application that is hand-delivered must be taken to:

U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.341A), Room 3671, Regional Office Building 3, 7th & D Streets, SW., Washington, DC 20202-4725.

The Application Control Center accepts deliveries daily between 8 a.m. and 4:30 p.m. (Washington, DC time), except Saturdays, Sundays and Federal holidays. A person delivering an application must use the D Street entrance only. A person delivering an application must show identification to enter the building.

If you send your application by courier or hand delivery, the Application Control Center will mail a Grant Application Receipt Acknowledgment to you. If you do not receive the notification of application receipt within 15 days from the delivery of the application, you should call the U.S. Department of Education Application Control Center at (202) 708-9493.

You must indicate on the envelope and—if not provided by the Department—in Item 4 of the Application for Federal Education Assistance (ED 424 (exp. 11/30/2004)) the CFDA number—and suffix letter, if any—of the competition under which you are submitting your application.

**V. Application Review Information**

1. *Selection Criteria:* The following criteria will be used to evaluate applications submitted for grants under the CTC program. The maximum score for an application is 100 points. The maximum score for each criterion or factor under that criterion is indicated in parentheses.

(a) *Need for the Project.* (10 points) In evaluating the need for the proposed project, we will consider the extent to which the proposed project will:

- (1) Serve students from low-income families;
- (2) Serve students entering or enrolled in high schools (9th through 12th grades) that are among the high schools in the State that have the highest numbers or percentages of students who have not achieved proficiency on the State academic assessments required by Title I of ESEA, or who have academic skills in reading or language arts, or mathematics, that are significantly below grade level;
- (3) Serve students who have the greatest need for supplementary instruction, as indicated by their scores on State or local standardized assessments in reading or language arts, or mathematics, or some other local

measure of performance in reading or language arts, or mathematics; and

(4) Create or expand access to information technology and related training for disadvantaged residents of distressed urban or rural communities.

(b) *Quality of the Project Design.* (35 points) In evaluating the quality of the project design, we will consider the extent to which the proposed project will adequately and effectively investigate and incorporate in its implementation plan the following elements:

(1) Provide instructional services that will be of sufficient size, scope, and intensity to improve the academic performance of participating students;

(2) Incorporate strategies that have proven effective for improving the academic performance of low-achieving students;

(3) Implement strategies in recruiting and retaining students that have proven effective;

(4) Provide instruction that is aligned with the high school curricula of the schools in which the students to be served by the grant are entering or enrolled; and

(5) Provide high-quality, sustained, and intensive professional development for personnel who provide instruction to students.

(c) *Quality of the Management Plan.* (15 points) In evaluating the quality of the management plan, we consider the extent to which the proposed project:

(1) Outlines specific, measurable goals, objectives, and outcomes to be achieved by the proposed project;

(2) Assigns responsibility for the accomplishment of project tasks to specific project personnel, and provides timelines for the accomplishment of project tasks;

(3) Requires appropriate and adequate time commitments of the project director and other key personnel to achieve the objectives of the proposed project; and

(4) Includes key project personnel, including the project director and other staff, with appropriate qualifications and relevant training and experience.

(d) *Adequacy of Resources.* (20 points) In determining the adequacy of the resources for the proposed project, we consider the following factors:

(1) The adequacy of support, including facilities, equipment, supplies, and other resources, from the applicant;

(2) The extent to which a preponderance of project resources will be used for activities designed to improve the academic performance of low-achieving students in grades 9

through 12 in reading and/or mathematics;

(3) The extent to which the budget is adequate and costs are reasonable in relation to the objectives and design of the proposed project; and

(4) The potential for continued support of the project after Federal funding ends, including, as appropriate, the demonstrated commitment of appropriate entities to such support.

(e) *Quality of the Evaluation.* (20 points) In determining the quality of the project evaluation, we consider the extent to which the application:

(1) Includes a plan that utilizes evaluation methods that are feasible and appropriate to the goals and outcomes of the project;

(2) Will regularly examine the progress and outcomes of participating students on a range of appropriate performance measures and has a plan for utilizing such information to improve project activities and instruction;

(3) Will use an independent, external evaluator with the necessary background and technical expertise to assess the performance of the project; and

(4) Effectively demonstrates that the applicant has adopted a rigorous evaluation design.

#### 2. *Review and Selection Process:*

Applicants that are NOT novice applicants (the definition of a "novice applicant" is provided elsewhere in this notice) must meet both absolute priorities in their applications or their applications will be rejected. Novice applicants must meet the second absolute priority in their applications or their applications will be rejected.

### VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN).

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

**Note:** The requirements listed in this notice are material requirements. A failure to comply with any applicable program requirement (for example, failure to show improvement on the required performance measures by the end of the year of the grant cycle) may subject a grantee to administrative action, including but not limited to designation as a "high-risk" grantee, the imposition of special conditions or the ineligibility to receive other awards from the Department of Education.

3. *Reporting:* At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary.

4. *Performance Measures:* The Secretary requires applicants for CTC grants to identify in their application specific goals and performance objectives for each of these goals to measure the progress of their project:

a. The number of disadvantaged students in high schools within the distressed areas that have access to information technology to help improve their academic performance.

b. The percentage of schools participating in the partnerships for community technology centers that meet their adequate yearly progress as defined by Title I of the ESEA.

In addition to the two required measures listed above, applicants may choose to set performance levels for other appropriate measures, such as:

a. Achievement and gains in English proficiency of limited English proficient students; and

b. The level of teacher, student, and parent satisfaction with the Community Technology Centers services provided.

### VII. Agency Contact

*For Further Information Contact:* Karen Holliday, U.S. Department of Education, OVAE, 400 Maryland Avenue, SW., Washington, DC 20202-7110. Telephone: (202) 245-7708 or via Internet at: [Karen.Holliday@ed.gov](mailto:Karen.Holliday@ed.gov).

If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1-800-877-8339.

Individuals with disabilities may obtain this document in an alternate format (e.g., Braille, large print, audiotope, or computer diskette) on request to the contact person listed in this section.

### VIII. Other Information

#### *Electronic Access to This Document*

You may view this document, as well as all other documents of this Department published in the **Federal Register**, in text or portable document format (PDF) on the Internet at the following site: <http://www.ed.gov/news/fedregister>.

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO) toll free at 1-888-293-6498, or in the Washington, DC, area at (202) 512-1530.

**Note:** The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: <http://www.gpoaccess.gov/nara/index.html>.

Dated: April 12, 2004.

**Susan Sclafani,**

*Assistant Secretary for Vocational and Adult Education.*

[FR Doc. 04-8660 Filed 4-15-04; 8:45 am]

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# Federal Register

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**Friday,  
April 16, 2004**

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## **Part V**

## **Department of Health and Human Services**

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**42 CFR Parts 50 and 93**

**Public Health Service Policies on  
Research Misconduct; Proposed Rule**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### 42 CFR Parts 50 and 93

RIN 0940-AA04

#### Public Health Service Policies on Research Misconduct

**AGENCY:** Department of Health and Human Services (HHS).

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department proposes substantial revisions to the existing regulation at 42 CFR part 50, subpart A, "Responsibilities of Awardee and Applicant Institutions for Dealing With and Reporting Possible Misconduct in Science," 54 FR 32446 (Aug. 8, 1989) (final rule). We propose to delete this regulation, which implemented section 493 of the PHS Act, and add a new part 93, subparts A, B, C, D, and E. The purpose of this proposed rule is to implement legislative and policy changes that have occurred since the regulation was issued, including the common Federal policies and procedures on research misconduct issued by the Office of Science and Technology Policy. We have developed the proposed changes based on over 12 years of experience with the existing final rule. The proposed rule would help to ensure public confidence in the integrity of scientific data and the Public Health Service (PHS) supported research process.

**DATES:** Submit comments on or before June 15, 2004.

**ADDRESSES:** You may submit comments, identified by RIN #0940-AA04, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *E-mail:* [Research@osophs.dhhs.gov](mailto:Research@osophs.dhhs.gov), attaching either a WordPerfect file—version 9.1 or higher, a Microsoft Word 97 or 2000 file, or an ASCII file (avoiding special characters and any form of encryption).

- *Mail:* Chris B. Pascal, J.D., Director, Office of Research Integrity, 1011 Wooten Parkway, Suite 750, Rockville MD 20852. Address all comments concerning this proposal to: Chris B. Pascal, J.D., Director, Office of Research Integrity, 1101 Wootton Parkway, Suite 750, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:** Brenda Harrington, 301-443-3400 (this is not a toll-free number).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

The National Institutes of Health Revitalization Act of 1993 (NIH Act),

Pub. L. 103-43, which amended the PHS Act, contains important provisions that affect this proposed rule. Section 161 of the NIH Act established the Office of Research Integrity (ORI) as an independent entity reporting to the Secretary of the U.S. Department of Health and Human Services (HHS). Section 162 of the NIH Act required the establishment of a Commission on Research Integrity to review a broad range of administrative and policy issues relating to research integrity, including the definition of research misconduct, and to provide a report to the Secretary and the Congress with recommendations for PHS policies on research integrity. The Commission began its work in 1994 and sent its final report to Congress and the HHS Secretary on November 3, 1995. Section 163 of the NIH Act also requires the Secretary to promulgate a regulation on the protection of whistleblowers involved in cases of possible research misconduct. *See* section 493 of the PHS Act, 42 U.S.C. 289b. We proposed separate regulations to implement the whistleblower provisions and published a Notice of Proposed Rulemaking, "Public Health Service Standards for the Protection of Research Misconduct Whistleblowers," 56 FR 70830 (Nov. 28, 2000); 65 FR 70830 (Dec. 29, 2000). We have postponed finalizing that regulation to ensure that its provisions are consistent with the proposed research misconduct rule.

In implementing the statutory provisions, the Secretary carefully reviewed: (1) The report issued by the Commission on Research Integrity; (2) the recommendations of an internal HHS review group established to evaluate HHS procedures for handling allegations of research misconduct; (3) the governmentwide policies on research misconduct developed by the Office of Science and Technology Policy (OSTP); and (4) other statutory and regulatory authorities such as 42 U.S.C. 216 and 241 and 42 CFR part 52 which confer broad authority upon the Secretary to regulate the use of PHS funds and to operate and manage PHS programs, including the authority to investigate and oversee investigations of allegations concerning the integrity of researchers who apply for or receive PHS funds and to take appropriate administrative actions to protect Federal funds and the public health, safety, and welfare. We developed this proposed rule to codify several important changes described below.

Section 493 of the PHS Act directs the Secretary to promulgate regulations requiring each entity that applies for or receives funds under the PHS Act for

the conduct of biomedical or behavioral research to submit assurances that the entity: (1) Has established an administrative process that conforms with the regulation to review reports of research misconduct in PHS biomedical or behavioral research; (2) will report to the Secretary any investigation of alleged research misconduct; and (3) will comply with the regulations. The statute also requires the Secretary to establish by regulation the process by which the ORI reviews allegations and institutional reports of research misconduct and takes appropriate actions in response to findings of misconduct.

In response to the original section 493 of the PHS Act, and to carry out its overall responsibilities in this area, the PHS established two offices in 1989 for dealing with research misconduct and published a Final Rule that contains requirements for extramural institutions applying for or receiving PHS research funds. The two offices were the Office of Scientific Integrity (OSI), located at the National Institutes of Health (NIH), and the Office of Scientific Integrity Review (OSIR), located in the Office of the Assistant Secretary for Health. OSI had the primary responsibility for overseeing investigations of research misconduct carried out by institutions and for conducting investigations when necessary. OSIR provided a second level of review for investigations and developed research integrity policies for the PHS.

On August 8, 1989, HHS published its final regulation at 42 CFR part 50, subpart A. 54 FR 32446. The rule assigns to applicant and awardee institutions the primary responsibility for investigating possible research misconduct. The regulation requires these institutions to file an initial assurance that they have established policies and procedures for investigations. Institutions also must report annually on the numbers and types of allegations and inquiries dealt with during the calendar year. The regulation codified the existing PHS definition of research misconduct and established general principles for the conduct of institutional inquiries and investigations.

Based on our experience with the 1989 regulation and concerns raised by Congress and the public about the effectiveness of the existing office structure, we announced the reorganization of our research misconduct operations in the **Federal Register** on June 8, 1992. 57 FR 24262. The reorganization abolished OSI and OSIR and transferred their functions to the newly established ORI within the

Office of the Assistant Secretary for Health. On November 6, 1992, we announced the new PHS procedures for administrative hearing procedures before a Research Integrity Adjudications Panel of the HHS Departmental Appeals Board. 57 FR 53125 (1992), revised 59 FR 29809 (June 9, 1994). Subsequently, a 1995 reorganization of the Office of the Assistant Secretary for Health placed ORI within the Office of Public Health and Science in the Office of the Secretary. 60 FR 56605 (Nov. 9, 1995).

In 1996, the Secretary created the HHS Review Group on Research Misconduct and Research Integrity, consisting of senior HHS officials representing the PHS and the Office of the Secretary, to review ORI's policies and procedures. In July of 1999, the HHS Review Group made 14 recommendations to improve the quality, effectiveness, and efficiency of the system for responding to allegations of research misconduct and promoting research integrity. The Secretary approved these recommendations in October of 1999, and we have implemented them through policy changes. Some of the more significant changes are included in this NPRM.

In March of 1999, NIH issued a report entitled "NIH Initiative to Reduce Regulatory Burden—Identification of Issues and Potential Solutions." We have carefully reviewed the "Research Integrity" section of the report. We have already implemented a number of the recommendations, such as assigning institutions primary responsibility for investigating misconduct, promoting increased education programs in research integrity, separating adjudication and appeals from the inquiry and investigation stages, and providing some flexibility to institutions in the assessment, inquiry, and investigation processes. Where appropriate, we propose to codify them in this proposed regulation.

In October of 1999, OSTP proposed a governmentwide definition of research misconduct for adoption and implementation by Federal agencies that conduct and support research. 64 FR 55722 (Oct. 14, 1999). After receiving comments, OSTP published a final notice consisting of a definition of research misconduct and policies and procedures for handling misconduct allegations. 65 FR 76260 (Dec. 6, 2000). The OSTP called upon all Federal agencies to adopt a common Federal framework for responding to research misconduct. Although our current practices are already substantially similar to the new OSTP policy, this proposed rule would bring the PHS

procedures into conformity in the few divergent areas. Therefore, we propose to adopt and incorporate the OSTP governmentwide definition and pertinent policy, procedures, and guidelines in the proposed regulation.

On May 12, 2000, the Secretary approved organizational changes that moved the responsibility for making proposed findings of research misconduct and administrative actions from ORI to the Assistant Secretary for Health. The reorganization also moved direct inquiries and investigations previously conducted by ORI to components of the PHS for intramural research and to the Office of the Inspector General for extramural research. ORI continues, among other things, to direct PHS research integrity activities on behalf of the Secretary, to coordinate the development of research integrity policies regarding whistleblowers and respondents, and to perform oversight review of research misconduct inquiries and investigations. 65 FR 30600 (May 12, 2000). ORI also has the responsibility of proposing findings of research misconduct to the Assistant Secretary for Health and, if the Respondent challenges those findings, supporting them before the HHS Departmental Appeals Board. These changes are included in the proposed regulation.

As discussed above, the NIH Revitalization Act of 1993 amended section 493 of the PHS Act to establish ORI by statute, and, among other things, to change the term "scientific misconduct" to "research misconduct." The proposed rule would implement these statutory amendments and a number of policy changes that we believe are necessary and appropriate, with the exception of the statutory provision regarding whistleblowers which we are promulgating in a separate regulation at 42 CFR part 94. The proposed rule incorporates many of the features of the existing Final Rule concerning responsibilities of awardee and applicant institutions, and it sets out our procedures for responding to research misconduct.

We invite public comments on all aspects of this proposed regulation and, in particular, on the following topics:

## II. Proposed Changes

### A. Applicability

1. *Inclusion of PHS Intramural Programs:* Based on the OSTP policy and a recommendation from the internal HHS review groups, we propose to codify a major difference between the existing Final Rule and current practice. Under section 93.102 of the proposed

rule, PHS intramural programs would be treated similarly to extramural research institutions. Because the procedures for conducting inquiries and investigations are largely the same for both extramural and intramural institutions, we have consolidated the procedures in the proposed regulation.

Therefore, in addition to investigating allegations of misconduct within their programs, the intramural programs would also submit assurances to ORI that they have established administrative processes to address allegations of misconduct in connection with research conducted by the intramural institution. ORI would continue to provide oversight of these intramural investigations just as it does for extramural programs. Additional instructions for PHS officials on intramural investigations may be issued via internal policies, as needed.

2. *Inclusion of Contracts:* The existing Final Rule does not include contracts involving PHS funds, but is limited to research grants, training grants, and cooperative agreements. The proposed rule expands the scope of coverage to include procurement contracts as required by the PHS Act and consistent with the OSTP policy and current PHS practice.

### B. Definition of Research Misconduct

1. *The Definition:* The regulatory definition of "scientific misconduct" in the existing Final Rule has been the subject of considerable discussion over the years since its introduction, and we have considered the comments and concerns expressed by Congress, the research community, and other interested organizations. Now, as noted above, OSTP has adopted a final new governmentwide Federal definition and guidelines on research misconduct.

As an initial matter, the existing Final Rule refers to "Misconduct or Misconduct in Science," 42 CFR 50.102, whereas, the proposed regulation refers to "Research Misconduct." This change would be consistent with the statutory amendments and the OSTP governmentwide definition.

In addition, the existing Final Rule defines "scientific misconduct" as "fabrication, falsification, plagiarism, or other practices \* \* \* for proposing, conducting, or reporting research." (Emphasis added.) In contrast, OSTP and section 93.103 of the proposed regulation define "research misconduct" in relation to "proposing, performing, or reviewing research, or in reporting research results." (Emphasis added.) The proposed regulation would use the term "performing" instead of "conducting" research and would

change the scope of the covered activity to include misconduct occurring in connection with the “reviewing” of research. The inclusion of “reviewing” in section 93.102 is consistent with the addition of “reviewing” in the proposed definition. This is also consistent with the intent of the HHS Review Group and the OSTP policy to include the process of submitting an application for research support (proposing), and the peer review of an application or a journal article (reviewing). We propose to retain the definition of research misconduct as “fabrication, falsification or plagiarism” (commonly called FFP), but would augment it to include OSTP’s description for each of these terms. The “other practices” clause of the existing final rule would be dropped.

We propose to interpret the phrase “data or results” in section 93.226 broadly to encompass all forms of scientific information about the research at issue without regard to the type of recording or storage media involved. The phrase would include, but not be limited to, raw numbers, field notes, interviews, notebooks and folders, laboratory observations, computers and other scientific equipment, CD-ROMs, hard drives, floppy disks, Zip disks, back-up tapes, machine counter tapes, research interpretations and analyses, tables, slides, photographs, charts, gels, individual facts, statistics, tissue samples, reagents, and statements by individuals. The phrase “statements by individuals” refers to documented oral representations of research results made by scientists and, therefore, would also be considered to be “data.”

**2. Burden of Proof:** We propose to revise slightly the burden for establishing research misconduct in three ways: First, in keeping with the OSTP policy, the proposed regulation would require that the FFP be a “significant departure” from accepted practices as opposed to ORI’s current standard of “serious deviation.” As discussed in the OSTP policy statement, the phrase “significant departure” intends to make clear that behavior alleged to invoke research misconduct should be assessed in the context of practices generally accepted by the relevant research community. As the current definition requires a serious deviation from practices generally accepted in the particular scientific community, we do not anticipate that this change in phraseology would alter the burden of proving or disproving research misconduct in any significant way. However, we specifically ask for comments on this issue.

Second, the proposed regulation is consistent with the OSTP position on

who has the burden of proving honest error or a difference of opinion. Proposed sections 93.106(a) and 93.516(c) provide that the respondent bears the burden of proving any affirmative defenses raised, including honest error and differences of opinion and any mitigating factors that the respondent wants the institution or HHS to consider in imposing administrative actions. Section 93.106(a) provides that once the institution or HHS makes a *prima facie* showing of research misconduct the burden of going forward to prove that the conduct was the result of an honest error or difference of opinion shifts to the respondent. Under section 93.106(a), the absence of, or a respondent’s failure to provide, research records adequately documenting the questioned research establishes a rebuttable presumption of research misconduct, specifically falsification. Credible evidence corroborating the research or providing a reasonable explanation for the absence of, or respondent’s failure to provide, these research records may be used by the respondent to rebut the presumption of research misconduct. Third, consistent with the OSTP policy, the level of intent would be expanded beyond an intentional and knowing standard to include recklessness.

**3. Plagiarism and the Definition of Research Misconduct:** Section 93.102 of the proposed regulation would be applicable to PHS supported research “including any research proposed, performed, reviewed, or reported \* \* \* regardless of whether the user or reviewer receives PHS support \* \* \*.” (Emphasis added.) Thus, the proposed regulation would expressly cover research misconduct involving plagiarism of PHS supported research. Neither the respondent nor the respondent’s research needs to be PHS supported for jurisdiction to attach. The misconduct regulation would cover plagiarism where the respondent has copied or appropriated ideas or data from another’s PHS supported research, for example, where the respondent is a reviewer in the PHS grants review process or where the respondent is a reviewer for a scientific journal.

The collective experience of the PHS and extramural institutions in dealing with alleged research misconduct has revealed the use of varying interpretations or definitions of the term “plagiarism.” For purposes of the existing final rule and proposed regulation, we consider plagiarism to include both the copying of words of another and the appropriation of ideas, findings, or methods of another without giving full and proper credit for those

words, ideas, or methods. Under the proposed regulation we would continue to limit our interpretation of the term plagiarism to exclude those acts that involve limited use of identical or nearly identical phrases (1) to describe a commonly used method, (2) to describe previous research in a scientific article, grant application, or contract proposal, and (3) where the use does not materially inflate the contribution of the author as perceived by the reader or reviewer in a manner which would be a significant departure from accepted standards.

In keeping with the PHS and OSTP policies, we would also continue to exclude disputes involving authorship or credit among collaborators unless they involve plagiarism. Past allegations have often involved disputes among former or current collaborators who participated jointly in the development or conduct of a research project, but who subsequently made independent use of the jointly developed concepts, methods, descriptive language, or other products of the joint effort. The ownership of the intellectual property in many of these situations is seldom clear, and the collaborative history among the scientists may support a presumption of implied consent for each of the collaborators to use their joint efforts. Although these disputes involve very important principles, we believe that these matters are best handled by the researchers and their institutions. See “ORI Provides Working Definition of Plagiarism,” *ORI Newsletter*, Vol. 3, No. 1 (Dec. 1994), available at <http://ori.dhhs.gov/html/publications/newsletters.asp>. Therefore, we propose to continue to consider them outside the PHS regulatory definition of plagiarism. As these issues are of long-term continuing interest, we invite comments on the PHS interpretation.

### C. Institutional and Federal Responsibilities

**1. Clarifying the Institutional and Federal Roles:** In general, the sections of the proposed regulation addressing the respective responsibilities of institutions and HHS contain more detail than the corresponding provisions of the existing final rule. Over the years, institutions have often requested guidance in these matters, but the existing final rule contained little in the way of explanation. In most instances, the increased detail would require minor, if any, changes to the current process used by the institutions and PHS for handling research misconduct allegations. Rather, the proposed regulation would memorialize current

practices, as developed through experience and contact with institutions, and recommendations already contained in ORI's guidance documents and model policies.

Codifying these practices and policies should be helpful to institutions and, in some instances, may provide them with legal protection. First, setting out the steps to be taken in a research misconduct proceeding would level the playing field by providing the accused researcher with much needed notice of the required process to be used and protections offered in addressing the allegations. Also as noted, many institutions have requested a more specific road map to follow in responding to allegations of research misconduct. Finally, formalizing the specific process for institutional responses to research misconduct allegations provides a mechanism by which all players in the process, *e.g.*, respondents, institutions, and complainants, may be held accountable.

**2. *Institutions' Primary Responsibility:*** Research institutions' responsibilities for handling allegations of research misconduct would remain substantially the same under the proposed regulation, in keeping with ORI's pre-existing conformity with the OSTP policy. Institutions would continue to have primary responsibility for conducting inquiries and investigations. In this regard, institutions have conducted over 95% of the PHS misconduct investigations since 1995 and all of them since 2000. Furthermore, as recommended by the HHS Review Group, we also propose at section 93.306 to increase institutional flexibility by specifically providing that institutions which are too small, or otherwise unable to respond adequately to allegations of research misconduct, would be able to use the services of a consortium or other entity to handle a research misconduct proceeding.

**3. *Providing a Clear Road Map:*** In conducting inquiries and investigations of research misconduct, institutions assume an important responsibility, made all the more important by the fact that the Federal government relies largely on the institution's work in taking action against an accused researcher. If an institution does not conduct a thorough and fair investigation, the case may be forever compromised, either failing to prove misconduct where it actually exists or not properly considering evidence that would exonerate the accused researcher. Therefore, we propose to modify the existing final rule in certain areas where it would assist in clarifying institutional responsibilities and PHS expectations.

For example, the proposed rule has several new definitions to aid in interpreting the regulation. Perhaps most importantly, the proposed rule would clarify the steps institutions should take to ensure a fair and thorough investigation, such as securing the evidence and giving the respondent a reasonable opportunity to comment on the investigational report. In addition, we propose more explicit guidance regarding what information and evidence institutions should provide to enable ORI to perform its oversight function.

**4. *Institutional Standards:*** Section 93.319 of the proposed regulation would formalize the current policy that institutions may, and many do, have different definitions and standards for research misconduct than those in the Federal regulation. For example, an institution may treat certain authorship disputes as plagiarism under its own internal standards for research misconduct while the PHS would not. Although an institution must apply the PHS regulatory definition, standards, and requirements in evaluating an allegation of research misconduct reported to ORI, it may also apply its internal definition or standards in determining whether research misconduct or other misconduct occurred at the institutional level. Thus, an institution may find misconduct under its internal standards and impose administrative actions based on that finding, regardless of whether it or PHS makes a finding of research misconduct under the PHS standards.

#### *D. Retention of the Inquiry Stage*

The existing final rule defines a two-stage process that takes place when an institution receives allegations of research misconduct: (1) An inquiry, or preliminary fact-finding, to determine if the allegation involves PHS supported research and has sufficient substance to warrant an investigation; and (2) an investigation, which is a thorough review and analysis of all relevant facts to reach a conclusion as to whether research misconduct has occurred, who was responsible, and how serious any misconduct was.

Institutions treat the inquiry phase in a widely varying manner, and the distinction between an inquiry and an investigation has caused much confusion. Some inquiries conducted by institutions are largely indistinguishable from investigations. As the OSTP policy adopts a two-stage process, we have retained the current two-stage process but propose to sharpen the distinction between inquiries and investigations by clarifying that the inquiry is only an

initial review of the allegations to see if they warrant an investigation.

#### *E. Safeguards*

**1. *Confidentiality:*** Section 93.108 of the proposed regulation would retain the goal of affording confidentiality, to the extent possible, for respondents and complainants in research misconduct proceedings, except for PHS administrative hearings, which must be open to the public in accordance with section 93.517(g). Section 93.108 uses the qualifying phrase, "to the extent possible," because research misconduct cases are often subject to unpredictable factors beyond institutional or agency control, and it is not always possible to ensure complete confidentiality for respondents and complainants in these proceedings. Except as otherwise required by law, records or evidence which could identify research subjects must be maintained confidentially. Parties must limit disclosure of this data to those who have a need to know to carry out a misconduct proceeding. Note that the regulation, Standards for Privacy of Individually Identifiable Health Information, 45 CFR parts 160 and 164, permits entities covered by that regulation to disclose individually identifiable health information to ORI for the oversight functions authorized by the Public Health Service Act and the implementing regulation.

**2. *Access to Data:*** Following the OSTP policy, the proposed regulation would provide an additional safeguard for respondents. Specifically, and in conformance with ORI's current practice, section 93.305(b) of the proposed regulation would require institutions, where appropriate, to give the respondent copies of or reasonable, supervised access to, the research records.

#### *F. Proposed Findings of Research Misconduct*

**1. *Separation of Fact-finding and Decision Making:*** We propose to adopt the current separation of the fact-finding and decision-making processes in research misconduct cases within HHS. The proposed regulation would codify the PHS practice since 1999, in which the decision to find research misconduct is made by the Assistant Secretary for Health (ASH) or the official designated by the ASH. OSTP policy also supports this separation. ORI would continue to be responsible for overseeing institutional inquiries and investigations and making recommendations for proposed research misconduct findings, settlements, and administrative actions to the ASH in cases where ORI believes misconduct

has occurred. Also, as under current practice, if ORI were to propose debarment as an administrative action, that decision would be made by the HHS Debarment Official, the Deputy Assistant Secretary for Grants and Acquisition Management.

2. *HHS Administrative Actions:* As recommended by OSTP, we propose in section 93.408 to include consideration of aggravating and mitigating factors in determining which HHS administrative actions are appropriate to protect the PHS and the research process. Historically, PHS has incorporated an aggravating and mitigating factor analysis in its assessment, but the proposed regulation would memorialize this policy and provide guidance to all parties.

#### G. HHS Inquiries and Investigations

HHS would continue to have ultimate oversight authority for PHS supported research. As part of this organizational scheme, PHS has assigned to ORI the responsibility of conducting oversight reviews of these investigations, recommending to the ASH findings and appropriate administrative actions necessary to protect the interests of the PHS, and supporting these findings before the HHS Departmental Appeals Board (DAB). However, infrequent circumstances may arise where it becomes necessary for HHS itself to investigate the allegations of research misconduct at an extramural or intramural institution. Section 93.400(a)(4) would codify the HHS Review Group's recommendation that the investigatory function for these cases be handled at the Departmental level. The HHS Office of Inspector General (OIG) will conduct such investigations.

#### H. Role of Complainants, Witnesses, and Others

1. *Good Faith:* The PHS Act requires the Secretary to establish regulations for preventing and responding to institutional retaliation against employees who raise *good faith* allegations that an individual has committed research misconduct, or that an institution has failed to respond adequately to an allegation of research misconduct. 42 U.S.C. 289b(e)(1). The existing final rule requires institutions to undertake "diligent efforts to protect the positions and reputations of those persons who, in *good faith*, make allegations." (Emphasis added.) 42 CFR 50.103(d)(13). Because the attachment of whistleblower protections is contingent upon the making of *good faith* allegations, section 93.210 of the proposed regulation would define what

it means to make an allegation in "good faith" and, conversely, when an allegation is not brought in good faith. With this provision, PHS seeks to clarify a common misunderstanding about the nature of whistleblower protection. Namely, even if an allegation is wrong, the person bringing that allegation is still entitled to protection against retaliation as long as the whistleblower made the allegation in good faith. However, if a complainant does not make an allegation in good faith, (e.g. makes an allegation with knowledge that the factual basis for the allegation is untrue), an institution may take reasonable action to redress any harm caused by the allegation. In the academic community, these are commonly known as "bad faith" allegations, and some institutions currently have policies and procedures for responding to them.

2. *Complainants and Witnesses in Research Misconduct Proceedings:* We recognize the critical role of complainants and other witnesses in research misconduct proceedings. The vast majority of cases that result in misconduct inquiries or investigations result from a complaint brought to the attention of appropriate institutional officials. However, the responsibility for addressing allegations should not fall on those who raise them. In conformance with the OSTP policy, the HHS Review Group, and current agency practice, this proposed rule would make clear that an institution has an obligation to pursue allegations of misconduct independent of the complainant's role. Once the complainant has made a formal allegation that research misconduct has occurred, that person does not participate in the research misconduct proceeding other than as a witness. A complainant is not the equivalent of a "party" in a private dispute. Complainants are witnesses in that they do not control or direct the process, do not have special access to evidence except as determined by ORI or the investigative body, and do not act as decision makers.

The proposed regulation would employ a new term, "complainant," defined at section 93.203 as a person who in good faith makes an allegation of research misconduct. The role of complainants is limited by the proposed provisions governing the conduct of inquiries and investigations. Under the proposed regulation, the institution may, but would no longer be required, to give the complainant an opportunity to comment on the inquiry and investigation reports.

#### I. Compliance

1. *Assurances for Small Institutions:* Since 1990, ORI has permitted institutions determined to be too small to conduct research misconduct proceedings effectively or without any appearance of a conflict of interest to submit a "Small Organization Statement" under which they agree to work with ORI to develop an alternative mechanism to handle research misconduct allegations. Proposed section 93.303 would codify this option. Because we want to retain the flexibility these small institutions need, we have not explicitly defined the upward limit of what is considered a small institution. In the past, this alternative for small institutions has been applied to institutions with no more than 10 employees.

2. *Using a consortium or other entity to conduct research misconduct proceedings.* The HHS Review Group suggested that institutions that were unable to conduct their own research misconduct proceedings use the services of a consortium or other entity qualified by practice and experience to conduct research misconduct proceedings. Section 93.306 would allow institutions that are too small, have real or apparent conflicts of interest, lack the capacity, or otherwise prefer not to conduct misconduct proceedings to elect this alternative. Our experience to date with this process has been positive, but we ask for comments as to whether there should be any limitations on an institution's ability to choose this option.

3. *Noncompliance with the Regulation:* The proposed regulation would provide more information on institutional compliance obligations and the potential actions we may take in response to compliance concerns. The existing final rule provides that an institution's failure to comply with its assurance and the applicable regulations may result in an enforcement action against the institution. However, that rule does not spell out what type of institutional action constitutes a failure to comply. Nor does it explain what type of enforcement action an institution may face for noncompliance other than revocation of its assurance and the loss of PHS funding.

Over the past several years, ORI has needed to take a number of compliance actions but has had to do so without any clear regulatory guidance in place for either the institution or ORI. We propose to rectify this problem and take some of the guesswork out of compliance enforcement. First, section 93.412 of the proposed regulation would

establish the circumstances under which ORI could find an institution out of compliance. These circumstances would include, among other things, a failure to establish and comply with policies and procedures required by the regulation or a failure to cooperate with review of institutional research misconduct proceedings. As we already view all of the factors listed in the proposed regulation as examples of potential institutional noncompliance, the regulation would essentially codify current policy and practice. To that end, like some of the other changes in the proposed regulation, we believe it is helpful to spell out existing practice.

A second way in which the proposed regulation would lend clarity to the compliance process would be the addition in section 93.413 of a more complete explanation of the potential enforcement actions that HHS may impose in response to institutional noncompliance. This clarification serves several functions. First, it introduces a graduated scheme of actions that ORI could take itself or propose to other PHS agencies or HHS, as appropriate, in response to a given instance of noncompliance. These actions, most of which are already in effect through other PHS regulations, range from issuance of a warning letter (which could also require an institution to take corrective actions) to revocation of an assurance. A graduated scheme of compliance actions responds both to the needs of HHS and the institutions. The proposed regulation would answer institutional concerns that the current compliance system provides only for the revocation of an assurance.

#### *J. Maintenance and Custody of Records.*

*Responsibility for maintenance and custody of research records and evidence:* We propose to codify current policy regarding ongoing institutional responsibilities for obtaining and maintaining custody of the research records of the accused researcher and other evidence relevant to the misconduct allegations. To protect respondents, the OSTP policy recommends that institutions provide accused researchers with reasonable access to the evidence supporting the allegations. It cautions that misconduct policies should ensure that the mere filing of an allegation does not bring research to a halt nor provide a basis for other disciplinary or adverse action absent other compelling reasons. Accordingly, section 93.305(b) of the proposed regulation would provide that, where appropriate, institutions must "give the respondent copies of or reasonable, supervised access to the

research record." However, we do not propose to limit an institution's control over its employees and the research conducted under its auspices. The proposed regulation would not give a respondent any rights to continue research in the face of reasonable institutional objections.

#### *K. Hearing Process*

We propose to add the HHS hearing process for reviewing PHS findings of research misconduct, as the existing final rule did not include provisions for a hearing. Since 1992, when we began to offer hearings, we have not had clear-cut procedures for research misconduct adjudications. Complainants, parties, witnesses, and others have commented that the current informal hearing procedures, published at 59 FR 29809 (1994), lack the consistency and clarity provided by binding rules of procedure for other types of cases. Accordingly, we believe that adding a hearing regulation applicable only to research misconduct cases is advisable to codify a fair, efficient, and timely process for accused researchers.

We have modeled the proposed hearing regulation in subpart E primarily on the current regulations, at 42 CFR part 1005, governing the hearing process for the exclusion of health care providers used by the OIG, while modifying them to reflect current practice, knowledge, and experience in research misconduct proceedings. The proposed regulation also retains several key features from the current informal procedures.

The current *ad hoc* hearing process involves a trial-like evidentiary hearing on the PHS findings of scientific misconduct and proposed HHS administrative actions by a three-person panel of the DAB. The panel, which may include one or two outside scientists, in addition to the DAB Board Member(s), conducts a *de novo* review in which the merits of the case are heard as if for the first time, without any reference to or reliance on any previous decision making or review process. In other words, both the PHS and the accused scientist have an opportunity to present their side of the case to the DAB. The DAB conducts this *de novo* hearing pursuant to the above noted informal guidelines and determines whether the respondent committed scientific misconduct and whether the proposed administrative actions should be imposed. In reaching its decision, the panel does not rely on the administrative record developed by the institution or ORI during its oversight review but instead relies solely upon

testimony and other evidence presented by the parties at the hearing.

Because proposed subpart E is new, we have described it in greater detail than the other subparts and request comment, especially on the following issues.

#### *1. Administrative Law Judges (ALJ):*

We believe that the proposal in section 93.502 to change from the current system of using a panel of three decision makers to using a single ALJ appointed from the DAB Administrative Law Judges would substantially improve and simplify the process for all parties. This change would provide a process similar to program exclusion cases brought by the OIG, cases which have similar impact on the subjects' reputations and livelihood. In fact, for many other HHS programs, including those conducted under the OIG regulation, a single decision maker conducts the hearings. Section 93.506, Authority of the Administrative Law Judge (ALJ), closely follows the OIG regulations at 42 CFR 1005.4. Under the OIG regulations, the ALJ must follow all Federal laws, regulations, and Secretarial delegations of authority. Proposed section 93.506(a) adds applicable HHS policies to this list, because certain policies and guidelines apply to PHS biomedical and behavioral research and research training grants.

*2. Recommended decision:* The ALJ's final ruling on the merits of the PHS misconduct findings and the HHS administrative actions will now constitute a recommended decision to the Assistant Secretary for Health. Under current practice, the DAB's decision on the merits of PHS findings of misconduct and HHS administrative actions, other than debarment, constitutes final agency action as to these matters. In 2000, the Secretary redelegated the authority to propose findings of research misconduct and administrative actions from the Director, ORI, to the Assistant Secretary for Health. The Assistant Secretary for Health will now take final agency action on PHS research misconduct appeals, exercising the office's delegated authority to affirm, reverse, or modify the ALJ's recommended decision. In accordance with 45 CFR part 76, the ALJ's final ruling constitutes proposed findings of fact to the HHS Debarring Official. The respondent may continue to have access to a final review in Federal court under the standards of the Administrative Procedure Act.

#### *3. Scientist Advisors and Experts:*

Substituting a single ALJ for the current three-person panel would alter, to some extent, the role of the scientist in the proceeding. Although the current

system theoretically permits the panel to have up to two scientist members, most panels to date have had either one or no scientist member. However, to ensure that the necessary scientific expertise is available, section 93.502(b) would authorize the ALJ to engage an expert in the relevant area of science to advise the ALJ on scientific or technical issues, and require the employment of such an expert, if requested by either party. This is consistent with recent developments in the Federal judicial system in which judges may select their own outside experts to help them understand cases involving complex scientific, medical, or technological issues. The proposed regulation contemplates that the ALJ would consult informally with the scientific expert, similar to the way experts are used by the Office of Special Masters, United States Court of Federal Claims in the National Vaccine Injury Compensation Program, rather than following the more formal procedures in Federal Rules of Evidence 706. Thus, we do not contemplate that the ALJ's expert advisor would provide testimony for the record, but either party to the hearing (e.g., the accused researcher and PHS) could offer its own experts as witnesses. Therefore, the proposed new process should simplify the proceedings while providing ample and necessary input from the scientific community.

**4. Real or Apparent Conflicts of Interest.** Consistent with current DAB and Federal court practice, section 93.502 (c) would prohibit the appointment of any ALJs or outside science advisors with any real or apparent conflict of interest that might reasonably impair their objectivity in the proceeding. Section 93.502(d) would establish a process for the disqualification of an ALJ or appointed scientist or expert and, consistent with Federal court practice, would also permit the ALJ to rule on a motion to disqualify. If the ALJ rules, either party could appeal the decision directly to the Chief ALJ. This process would permit the ALJ and Chief ALJ to address potential conflicts of interest while maintaining a fair and objective hearing process.

**5. Relation to HHS Debarment Regulations:** The HHS Debarment Official refers disputed material facts related to a proposed debarment in PHS research misconduct proceedings to the DAB for determination. See 45 CFR 76.314(b)(2). Subpart E of the proposed regulation would be consistent with this practice and would not supersede or otherwise alter the existing HHS Debarment regulations or procedures for contesting proposed debarments.

**6. Amendment to the PHS Charge Letter:** Consistent with current DAB practice, section 93.514 would permit the PHS to amend its findings of research misconduct up to 30 days before the scheduled hearing. We anticipate that this would occur only in rare circumstances where we learned of additional acts of research misconduct after the DAB process had begun (e.g., the acquisition of new information during the discovery process). In addition, the Assistant Secretary for Health and the HHS Debarment Official (if debarment were proposed) would have to approve any amendments. In this instance, the respondent could request a postponement of the hearing to prepare a response to the new charge.

**7. De Novo Proceedings:** Consistent with current policy, section 93.517(b) would codify the current practice of providing a *de novo* hearing to consider challenges to any PHS findings of research misconduct and proposed PHS administrative actions. We also propose in section 93.503(d) to incorporate the current practice that permits a respondent to waive an in-person hearing and have the case decided on the basis of the administrative record.

**8. Standardization of Requirements:** We believe that the proposed regulation would level the playing field by letting respondents know up front how the hearing process works. For example, the regulation sets up requirements for the content of the hearing request (sections 93.503–504), time frames for conducting preliminary conferences (section 93.511), discovery (section 93.512), submission of witness lists and exhibits (section 93.513), and the post-hearing process (sections 93.520 through 523). Knowledge of these standards by the accused researchers would help promote a fair, timely, efficient, and less costly process for all parties.

**9. Limited Discovery:** Generally, discovery is not required to be made available in administrative proceedings. Under the Administrative Procedure Act, agencies may decide the extent of available discovery. We propose to follow the standard Federal administrative practice of limiting discovery to an exchange of documents. Thus, like other HHS procedures, the proposed regulation would not permit other forms of discovery available in Federal court litigation, such as requests for admissions, written interrogatories, and deposition. See section 93.512(a). Limited discovery results in a faster and more efficient process that reduces litigation costs for all parties. Following discussion at a prehearing conference, the ALJ could order the parties to develop stipulations and admissions of

fact. See section 93.511(b)(2). In past hearings, however, these mechanisms have not resulted in narrowing the issues or improving the efficiency of the hearing, because the parties had to prepare, but failed to agree on, any stipulations or admissions.

**10. Written Direct Testimony and Use of Telephone and Audio-Visual Communication:** Section 93.518(b) of the proposed regulation would permit the ALJ to admit written witness testimony, including prior sworn testimony, if the person is available for cross-examination. Section 93.518(c) would permit testimony by telephonic or audio-visual communication. Past experience has shown that these features help foster an efficient and streamlined hearing process and reduce the risk of unfair surprise and increased cost and inconvenience to the parties and witnesses.

**11. Evidentiary Standards:** We also propose to clarify the standards for admitting evidence at the hearing. Section 93.519(c) addresses the standard Federal administrative practice of admitting relevant and material evidence and excluding unreliable or unfairly prejudicial evidence. To avoid ambiguity, the proposed regulation also incorporates several provisions of the Federal Rules of Evidence. See sections 93.519(f)–(i). Similarly, section 93.519(e) would permit the ALJ to take judicial notice of established scientific and technical facts, which would reduce the need for expert testimony and, thereby, provide a cost savings to the parties.

**12. Other Federal Laws or Regulations:** With respect to the hearing process, the proposed regulation would not supersede or otherwise alter existing Federal laws or regulations that may provide additional procedures for Federal employees.

**13. Recordkeeping for Inquiries and Research Misconduct Proceedings:** The OIG has raised concerns that the 3 year period for retaining inquiry records in the current regulation, 42 CFR 50.103(d)(6), is too short to permit HHS or the Department of Justice to investigate potential civil or criminal fraud cases. Accordingly, the new NPRM proposes extending the period for retaining records on inquiries and misconduct proceedings to 7 years. See proposed sections 93.309(c) and 93.317(a).

#### L. Other Features of the Proposed Rule

**1. Coordination with Federal Agencies:** Federal agencies try to coordinate when allegations arise that affect more than one funding agency. For example, NIH and the Department

of Energy might be jointly funding a particular project which is the subject of research misconduct allegations. Failure to coordinate may result in overlooking important government policies, adversely impacting other agencies' missions and interests, and duplicating or wasting resources. Therefore, the NPRM proposes to codify current practice to recognize that, in these instances, the agencies may coordinate responses with other Federal agencies. The PHS has coordinated with other interested Federal agencies in a number of cases and will continue to do so.

2. *Limitations period:* Because of the problems that may occur in investigating older allegations and the potential unfairness to accused researchers in defending against them, we propose to limit the scope of the misconduct regulations to cases in which the alleged misconduct occurred within 6 years before the allegation. The proposed rule models this limitation period after the one used in the *qui tam* provision of the False Claims Act, 31 U.S.C. 3731(b), and after the procedures used by the OIG in its Medicare and Medicaid exclusion cases. Thus, with a few exceptions, we would be barred from going forward with cases where the alleged misconduct occurred outside this 6 year window.

3. *Person:* Section 93.219 of the proposed regulation would define "person" to include individuals as well as institutions and other organizations. This approach to the definition of "person" is consistent with many regulatory schemes including the governmentwide nonprocurement debarment regulation which is cross-referenced with the proposed misconduct regulation.

4. *Investigation time limits:* The OSTP policy recommends that the Federal agencies establish reasonable time lines to balance expeditious completion of an institutional research misconduct process against fairness and thoroughness. Consistent with the existing final rule, sections 93.307(g) and 93.311 would maintain the 60-day time limit for institutional inquiries and the 120-day time limit for investigations, subject to extensions. As experience has shown that institutions often need extensions of time, we seek comments on whether these time limits are realistic and provide sufficient time to conduct inquiries and investigations.

5. *Institutional Appeals:* Although not required under the existing Final Rule, some institutions provide respondents with an internal process by which to appeal the institutional finding of misconduct. Our experience has shown that often these appeals may result in

substantial delays in completing the institutional process and any subsequent review. Therefore, in section 93.314, we have proposed a 120-day deadline for completion of institutional appeals. This section would provide that any appeals must be completed within 120 days of filing the appeal, unless extended by ORI for good cause. The 120-day time limit would apply only to a respondent's appeal of the merits of an institutional finding of research misconduct, if such a process is provided by an institution's research misconduct policy. The 120-day time frame would not apply to any other procedures that an institution may have, such as tenure proceedings, disciplinary proceedings, or honor committee proceedings, that do not go to the merits of a research misconduct finding. It also would not apply to any civil law suits filed by a respondent challenging a finding of research misconduct. We ask for comment on whether this proposed time limit is appropriate and would ameliorate the problems caused by delays in completing proceedings, and, if so, whether the proposed 120 day deadline is sufficient.

6. *Settlements:* In making findings of research misconduct, ORI has relied on settlement agreements with the accused scientist the great majority of the time. These settlements can occur at any stage of the investigative process, from the allegation to completion of the investigation. Consistent with ORI's prior practice, ORI has expressly provided in proposed section 93.409 that ORI may settle a research misconduct proceeding at any time in the best interests of the Federal government and the public health or welfare. ORI has also participated in three-way agreements with the research institution, ORI, and the accused scientist. We encourage institutions or respondents (or counsel) to contact ORI directly when a settlement agreement appears feasible. Finally, we caution institutions about entering into settlement agreements with the respondent without consulting with ORI in advance. In some cases, the institution has purported to enter into a binding agreement with the respondent that seeks to restrict the scope of an investigation or otherwise limits ORI's or the institution's authority under the regulation. Any such attempt would have no binding effect on ORI and would not abrogate the institution's regulatory obligations. Accordingly, we request that any institution considering such action consult with ORI staff and counsel before agreeing to any

settlement. However, no regulatory language requires that institutions do so.

#### M. Structure and Format

We propose to adopt a different approach to the structure and format from the existing final rule based on the Presidential Memorandum on Plain Language issued on June 1, 1998. This memorandum directed Federal agencies to ensure that all of their documents are clear and easy to read. We organized the proposed rule so that matters common to a particular subject appear together. We also grouped related sections within subparts and placed them under unnumbered, centered headings. This allows readers easy access to information of particular importance to them. We have used fewer legal terms and more commonly understood words along with shorter sentences and have tried to make each section easy to understand by using clear and simple language rather than jargon. We would like your comments on how effectively we have used plain language, the organization and format of the proposed rule, and whether the document is clear and easy to read.

### III. Analysis of Impacts

As discussed in greater detail below, we have examined the potential impact of this proposed rule as directed by Executive Orders 12866 and 13132, the Unfunded Mandates Act of 1995, the Regulatory Flexibility Act, and the Paperwork Reduction Act of 1995.

We have also determined that this proposed rule would not: (1) Have an impact on Family Well-Being under section 654 of the Treasury and General Government Appropriations Act of 1999; nor (2) have a significant adverse effect on the supply, distribution, or use of energy sources under Executive Order 13211.

#### A. Executive Order 12866

These proposed regulations have been drafted and reviewed in accordance with Executive Order 12866 (58 FR 51735), section 1(b), Principles of Regulation. The Department has determined that this proposed rule is a "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review because it will materially alter the obligations of recipients of PHS biomedical and behavioral research and research training grants. However, the proposed regulation is not economically significant as defined in section 3(f)(1), because it will not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy,

productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. Therefore, the information enumerated in section 6(a)(3)(C) of the Executive Order is not required. The proposal has been reviewed by the Office of Management and Budget (OMB) under the terms of the Executive Order. Recipients of PHS biomedical and behavioral research grants will have to comply with the reporting and record keeping requirements in the proposed regulation. As shown below in the Paperwork Reduction Act analysis, those burdens encompass essentially all of the activities of the institutions that are required under the proposed regulation. The total annual burden is 18,279.5 hours. The U.S. Department of Labor, Bureau of Labor Statistics, sets the mean hourly wage for Educational Administrators, Postsecondary at \$31.14. The mean hourly wage for lawyers is \$43.90. The average hourly cost of benefits for all civilian workers would add \$6.41 to these amounts. In order to ensure that all possible costs are included and to account for potential higher rates at some institutions, we estimated the cost per burden hour at \$100. This results in a total annual cost for all institutions of \$1,827,950.

#### *B. The Unfunded Mandates Reform Act of 1995*

Sections 202 and 205 of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532 and 1535) require that agencies prepare several analytic statements before proposing a rule that may result in annual expenditures of State, local, and tribal governments, or by the private sector, of \$100 million or more in any one year. As any final rule resulting from this proposal would not result in expenditures of this magnitude, the Secretary certifies that such statements are not necessary.

#### *C. Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) requires agencies to prepare a regulatory flexibility analysis describing the impact of the proposed rule on small entities, but also permits agency heads to certify that a proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. The primary effect of this rule would be to require covered institutions to implement policies and procedures for responding to research misconduct cases. The Department certifies that this proposed rule would not have a significant impact on a substantial

number of small entities, as defined by the Regulatory Flexibility Act, based on the following facts.

Approximately 47 percent (1862) of the 4000 institutions that currently have research misconduct assurances are small entities. The primary impact of the NPRM on covered institutions results from the reporting and record keeping provisions which are analyzed in detail under the heading, "The Paperwork Reduction Act." Significant annual burdens apply only if an institution learns of possible research misconduct and begins an inquiry, investigation, or both. In 2001, 86 inquiries and 46 investigations were conducted among all the institutions. No investigations were conducted by a small entity and only one conducted an inquiry. Small entities would be able to avoid entirely the potential burden of conducting an inquiry or investigation by filing a Small Organization Statement under proposed section 93.303. The burden of filing this Statement is .5 hour. Thus, the significant burden of conducting inquiries and investigations will not fall on a substantial number of small entities.

A small organization that files the Small Organization Statement must report allegations of research misconduct to ORI and comply with all provisions of the proposed regulation other than those requiring the conduct of inquiries and investigations. The total annual average burden per response for creating written policies and procedures for addressing research misconduct is approximately 16 hours. However, approximately 99 percent of currently funded institutions already have these policies and procedures in place and spend approximately .5 hour updating them. The most significant of the burdens that might fall on an entity filing a Small Organization Statement is taking custody of research records and evidence when there is an allegation of research misconduct. The average burden per response is 35 hours, but based on reports of research misconduct over the last three years, less than 5 small entities would have to incur that burden in any year.

Based on the forgoing analysis, the Department concludes that the regulations proposed in the NPRM will not impose a significant burden on a substantial number of small entities. However, we will carefully consider comments on the analysis and conclusion.

#### *D. Executive Order 13132: Federalism*

This proposed rule, if published as a final rule, would not have substantial direct effects on the States, on the

relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, we have determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

#### *E. The Paperwork Reduction Act*

Sections 300–305, 307–311, 313–318, and 413 of the proposed rule contain information collection requirements that are subject to review by the OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*). The title, description, and respondent description of the information collection requirements are shown below with an estimate of the annual reporting burdens. Included in the estimates is the time for reviewing instructions, gathering and maintaining the data needed, and completing and reviewing the collection of information. With respect to the following information collection description, PHS invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of PHS functions, including whether the information will have practical utility; (2) the accuracy of the PHS estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of collection of information on respondents, including the use of automatic collection techniques or other forms of information technology.

*Title:* Public Health Service Policies on Research Misconduct.

*Description:* This proposed rule revises the current regulation, 42 CFR 50.101, *et seq.*, in three significant ways and will supersede the current regulation. First, the proposed rule integrates the White House Office of Science and Technology Policy's (OSTP) December 6, 2000, governmentwide Federal Policy on Research Misconduct. Second, the proposed rule incorporates the recommendations of the HHS Review Group on Research Misconduct and Research Integrity that were approved by the Secretary of HHS on August 25, 1999. Third, the proposed rule integrates a decade's worth of experience and understanding since the agency's first regulations were promulgated.

*Description of Respondents:* The “respondents” for the collection of information described in this regulation are institutions that apply for or receive PHS support through grants, contracts, or cooperative agreements for any project or program that involves the conduct of biomedical or behavioral research, biomedical or behavioral research training, or activities related to that research or training (*see* definition of “Institution” at section 93.214).

### **Subpart C—Responsibilities of Institutions**

#### **Compliance and Assurances**

##### *Section 93.300(a)*

*See* section 93.304 for burden statement.

##### *Section 93.300(c)*

*See* section 93.320 for burden statement.

##### *Section 93.300(i)*

*See* section 93.301(a) for burden statement.

##### *Section 93.301(a)*

Covered institutions must provide ORI with an assurance either by submitting the initial certification (500 institutions) or by submitting an annual report (3500 institutions).

*Number of Respondents:* 4000.

*Number of Responses per Respondent:* 1.

*Annual Average Burden per Response:* .5 hour.

*Total Annual Burden:* 2000 hours.

##### *Section 93.302(a)(1)*

*See* section 93.301(a) for burden statement.

##### *Section 93.302(a)(2)*

*See* section 93.320 for burden statement.

##### *Section 93.302(a)(3)*

Each applicant institution must inform its scientific and administrative staff of the institution’s policies and procedures and emphasize the importance of compliance with these policies and procedures.

*Number of Respondents:* 4000.

*Number of Responses per Respondent:* 1.

*Annual Average Burden per Response:* .5 hour.

*Total Annual Burden:* 2000 hours.

##### *Section 93.302(b)*

*See* section 93.301(a) for burden statement.

##### *Section 93.302(c)*

In addition to the annual report, covered institutions must submit aggregated information to ORI on request regarding research misconduct proceedings.

*Number of Respondents:* 100.

*Number of Responses per Respondent:* 1.

*Annual Average Burden per Response:* 1 hour.

*Total Annual Burden:* 100 hours.

##### *Section 93.303*

Covered institutions that, due to their small size, lack the resources to develop their own research misconduct policies and procedures may elect to file a “Small Organization Statement” with ORI.

*Number of Respondents:* 75.

*Number of Responses per Respondent:* 1.

*Annual Average Burden per Response:* .5 hour.

*Total Annual Burden:* 37.5 hours.

##### *Section 93.304*

Covered institutions with active assurances must have written policies and procedures for addressing research misconduct. Approximately 3500 institutions already have these policies and procedures in place in any given year and spend minimal time (.5 hour) updating them. Approximately 500 institutions each year spend an average of two days creating these policies and procedures for the first time.

*Number of Respondents:* 4000.

*Number of Responses per Respondent:* 1.

*Annual Average Burden per Response:* 2.5 hours.

*Total Annual Burden:* 10,000 hours.

##### *Section 93.305(a), (b), (d), and (e)*

When a covered institution learns of possible research misconduct, it must promptly take custody of all research records and evidence and then inventory and sequester them. Covered institutions must also take custody of additional research records or evidence discovered during the course of a research misconduct proceeding. Once the records are in custody, the institutions must maintain them until ORI requests them, HHS takes final action, or as required under section 93.317.

*Number of Respondents:* 53.

*Number of Responses per Respondent:* 1.

*Annual Average Burden per Response:* 35 hours.

*Total Annual Burden:* 1855 hours.

##### *Section 93.305(c)*

Where appropriate, covered institutions must give the respondent copies of or reasonable, supervised access to the research record.

*Number of Respondents:* 53.

*Number of Responses per Respondent:* 1.

*Annual Average Burden per Response:* 5 hours.

*Total Annual Burden:* 265 hours.

#### **The Institutional Inquiry**

##### *Section 93.307(b)*

At the time of or before beginning an inquiry, covered institutions must notify the presumed respondent in writing.

*Number of Respondents:* 53.

*Number of Responses per Respondent:* 1.

*Annual Average Burden per Response:* 1 hour.

*Total Annual Burden:* 53 hours.

##### *Section 93.307(e)*

*See* section 93.309 for burden statement.

##### *Section 93.307(f)*

Covered institutions must provide the respondent an opportunity to review and comment on the inquiry report and attach any comments to the report.

*Number of Respondents:* 53.

*Number of Responses per Respondent:* 1.

*Annual Average Burden per Response:* 1 hour.

*Total Annual Burden:* 53 hours.

##### *Section 93.308(a)*

Covered institutions must notify the respondent whether the inquiry found that an investigation is warranted.

*Number of Respondents:* 53.

*Number of Responses per Respondent:* 1.

*Annual Average Burden per Response:* .5 hour.

*Total Annual Burden:* 26.5 hours.

##### *Section 93.309(a)*

When a covered institution issues an inquiry report in which it finds that an investigation is warranted, the institution must provide ORI with a specified list of information within 30 days of the inquiry report’s issuance.

*Number of Respondents:* 16.

*Number of Responses per Respondent:* 1.

*Annual Average Burden per Response:* 16 hours.

*Total Annual Burden:* 256 hours.

##### *Section 93.309(b)*

Covered institutions must keep sufficiently detailed documentation of

inquiries to permit a later assessment by ORI of reasons why decision was made to forego an investigation.

*Number of Respondents:* 37.

*Number of Responses per Respondent:* 1.

*Annual Average Burden per Response:* 1 hour.

*Total Annual Burden:* 37 hours.

### **The Institutional Investigation**

#### *Section 93.310(b)*

See section 309(a) for burden statement.

#### *Section 93.310(c)*

Covered institutions must notify the respondent of allegations of research misconduct before beginning the investigation.

*Number of Respondents:* 16.

*Number of Responses per Respondent:* 1.

*Annual Average Burden per Response:* 1.

*Total Annual Burden:* 16 hours.

#### *Section 93.310(d)*

See section 93.305(a), (b), (d) and (e) for burden statement.

#### *Section 93.310(g)*

Covered institutions must record or transcribe all witness interviews, provide the recording or transcript to the witness for correction, and include the recording or transcript in the record of the investigation.

*Number of Respondents:* 16.

*Number of Responses per Respondent:* 1.

*Annual Average Burden per Response:* 15 hours.

*Total Annual Burden:* 240 hours.

#### *Section 93.311(b)*

If unable to complete the investigation in 120 days, covered institutions must submit a written request for an extension from ORI.

*Number of Respondents:* 16.

*Number of Responses per Respondent:* 1.

*Number of Responses per Respondent:* 1.

*Annual Average Burden per Response:* .5 hour.

*Total Annual Burden:* 2.5 hours.

#### *Section 93.315*

At the conclusion of the institutional investigation process, covered institutions must submit four items to ORI: The investigation report (with attachments and appeals), final institutional actions, the institutional finding, and any institutional administrative actions.

*Number of Respondents:* 16.

*Number of Responses per Respondent:* 1.

*Annual Average Burden per Response:* 80 hours.

*Total Annual Burden:* 1280 hours.

#### *Section 93.316(a)*

Covered institutions that plan to end an inquiry or investigation before completion for any reason must contact ORI before closing the case and submitting its final report.

*Number of Respondents:* 10.

*Number of Responses per Respondent:* 1.

*Annual Average Burden per Response:* 2 hours.

*Total Annual Burden:* 20 hours.

### **Other Institutional Responsibilities**

#### *Section 93.317(a) and (b)*

See section 93.305(a), (b), (d), and (e) for burden statement.

#### *Section 93.318*

Covered institutions must notify ORI immediately in the event of any of an enumerated list of exigent circumstances.

*Number of Respondents:* 2.

*Number of Responses per Respondent:* 1.

*Annual Average Burden per Response:* 1 hour.

*Total Annual Burden:* 2 hours.

### **Subpart D—Responsibilities of the U.S. Department of Health and Human Services**

#### **Institutional Compliance Issues**

##### *Section 93.413(c)(6)*

ORI may require noncompliant institutions to adopt institutional integrity agreements.

*Number of Respondents:* 1.

*Number of Responses per Respondent:* 1.

*Annual Average Burden per Response:* 20 hours.

*Total Annual Burden:* 20 hours.

The Department will submit a copy of this proposed rule to OMB for its review and approval of this information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the agency official designated for this purpose whose name appears in this preamble and to fax number (202) 395–6974, Attn: Fumie Yokota. Submit written comments by June 15, 2004.

### **List of Subjects**

#### *42 CFR Part 50*

Administrative practice and procedure, Science and technology, Reporting and recordkeeping requirements, Research, Government contracts, Grant programs.

#### *42 CFR Part 93*

Administrative practice and procedure, Science and technology, Reporting and recordkeeping requirements, Research, Government contracts, Grant programs.

Dated: December 29, 2003.

**Cristina V. Beato,**

*Acting Assistant Secretary for Health.*

Approved: December 31, 2003.

**Tommy G. Thompson,**

*Secretary of Health and Human Services.*

**Editorial Note:** This document was received in the Office of the Federal Register on April 13, 2004.

Accordingly, under the authority of 42 U.S.C. 289b, HHS proposes to amend 42 CFR parts 50 and 93 to read as follows:

### **PART 50—POLICIES OF GENERAL APPLICABILITY**

1. The authority citation for 42 CFR part 50 continues to read as follows:

**Authority:** Sec. 493, Public Health Service Act, as amended, 99 Stat. 874–875 (42 U.S.C. 289b); Sec. 501(f), Public Health Service Act, as amended, 102 Stat. 4213 (42 U.S.C. 290aa(f)).

#### **Subpart A [Removed]**

2. Part 50, Subpart A is removed and reserved.

#### **PART 93 [ADDED]**

3. A new Part 93, with subparts A, B, C, D and E, is added to read as follows:

### **PART 93—PUBLIC HEALTH SERVICE POLICIES ON RESEARCH MISCONDUCT**

Sec.

93.25 Organization of this part.

93.50 Special terms.

#### **Subpart A—General**

93.100 General policy.

93.101 Purpose.

93.102 Applicability.

93.103 Research misconduct.

93.104 Requirements for findings of research misconduct.

93.105 Time limitations.

93.106 Evidentiary standards.

93.107 Rule of interpretation.

93.108 Confidentiality.

93.109 Coordination with other agencies.

**Subpart B—Definitions**

- 93.200 Administrative action.
- 93.201 Allegation.
- 93.202 Charge letter.
- 93.203 Complainant.
- 93.204 Contract.
- 93.205 Debarment or suspension.
- 93.206 Debarring official.
- 93.207 Deciding official.
- 93.208 Departmental Appeals Board or DAB.
- 93.209 Evidence.
- 93.210 Funding component.
- 93.211 Good faith.
- 93.212 Hearing.
- 93.213 Inquiry.
- 93.214 Institution.
- 93.215 Institutional member
- 93.216 Investigation.
- 93.217 Notice.
- 93.218 Office of Research Integrity or ORI.
- 93.219 Person.
- 93.220 Preponderance of the evidence.
- 93.221 Prima facie showing.
- 93.222 Public Health Service or PHS.
- 93.223 PHS support.
- 93.224 Research.
- 93.225 Research misconduct proceeding.
- 93.226 Research record.
- 93.227 Respondent.
- 93.228 Retaliation.
- 93.229 Secretary or HHS.

**Subpart C—Responsibilities of Institutions****Compliance and Assurances**

- 93.300 General responsibilities for compliance.
- 93.301 Institutional assurances.
- 93.302 Institutional compliance with assurances.
- 93.303 Assurances for small institutions.
- 93.304 Institutional policies and procedures.
- 93.305 Responsibility for maintenance and custody of research records and evidence.
- 93.306 Using a consortium or other entity for research misconduct proceedings.

**The Institutional Inquiry**

- 93.307 Institutional inquiry.
- 93.308 Notice of the results of the inquiry.
- 93.309 Reporting to ORI on the decision to initiate an investigation .

**The Institutional Investigation**

- 93.310 Institutional investigation.
- 93.311 Investigation time limits.
- 93.312 Opportunity to comment on the investigation report.
- 93.313 Institutional investigation report.
- 93.314 Institutional appeals.
- 93.315 Notice to ORI of institutional findings and actions.
- 93.316 Completing the research misconduct process.

**Other Institutional Responsibilities**

- 93.317 Retention and custody of the research misconduct proceeding record.
- 93.318 Notifying ORI of special circumstances.
- 93.319 Institutional standards.

**Subpart D—Responsibilities of the U.S. Department of Health and Human Services****General Information**

- 93.400 General statement of ORI authority.
- 93.401 Communications with other offices and interim actions.

**Research Misconduct Issues**

- 93.402 ORI allegation assessments.
- 93.403 ORI review of research misconduct proceedings.
- 93.404 HHS findings on research misconduct proceedings.
- 93.405 Notifying the respondent of findings of research misconduct and HHS administrative actions.
- 93.406 Final HHS actions.
- 93.407 HHS administrative actions.
- 93.408 Mitigating and aggravating factors in HHS administrative actions.
- 93.409 Settlement of research misconduct proceedings.
- 93.410 Final HHS action with no settlement or finding of research misconduct.
- 93.411 Final HHS action with a settlement or finding of research misconduct.

**Institutional Compliance Issues**

- 93.412 Making decisions on institutional noncompliance.
- 93.413 HHS compliance actions.

**Disclosure of Information**

- 93.414 Notice.

**Subpart E—Opportunity To Contest PHS Findings of Research Misconduct and HHS Administrative Actions****General Information**

- 93.500 General policy.
- 93.501 Opportunity to contest PHS findings of research misconduct and HHS administrative actions.

**Hearing Process**

- 93.502 Appointment of the Administrative Law Judge and scientific expert.
- 93.503 Grounds for granting a hearing request.
- 93.504 Grounds for dismissal of a hearing request.
- 93.505 Rights of the parties.
- 93.506 Authority of the Administrative Law Judge .
- 93.507 *Ex parte* communications.
- 93.508 Filing, forms, and service.
- 93.509 Computation of time.
- 93.510 Filing motions.
- 93.511 Prehearing conferences.
- 93.512 Discovery.
- 93.513 Submission of witness lists, witness statements, and exhibits.
- 93.514 Amendment to the charge letter.
- 93.515 Actions for violating an order or for disruptive conduct.
- 93.516 Standard and burden of proof.
- 93.517 The hearing.
- 93.518 Witnesses.
- 93.519 Admissibility of evidence.
- 93.520 The record.
- 93.521 Correction of the transcript.
- 93.522 Filing post-hearing briefs.
- 93.523 The Administrative Law Judge's ruling.

**Authority:** 42 U.S.C. 216, 241, and 289b.

**§ 93.25 Organization of this part.**

This part is subdivided into five subparts. Each subpart contains information related to a broad topic or specific audience with special responsibilities as shown in the following table.

| In subpart . . . | You will find provisions related to . . .  |
|------------------|--|
| A                | General information about this rule.   |
| B                | Definitions of terms used in this part.  |
| C                | Responsibilities of institutions with PHS support.   |
| D                | Responsibilities of the U.S. Department of Health and Human Services and the Office of Research Integrity. |
| E                | Information on how to contest PHS research misconduct findings and HHS administrative actions.             |

**§ 93.50 Special terms.**

This part uses terms throughout the text that have special meaning. Those terms are defined in subpart B of this part.

**Subpart A—General****§ 93.100 General policy.**

(a) The U.S. Department of Health and Human Services (HHS) and institutions, including individual researchers who apply for or receive Public Health Service (PHS) support for biomedical or behavioral research, biomedical or behavioral research training, or activities related to that research or training share responsibility for the integrity of the research process. HHS has ultimate oversight authority for PHS supported research, and for taking other actions as appropriate or necessary, including the right to assess allegations and perform inquiries or investigations at any time. Institutions have primary responsibility for reporting and responding to allegations of research misconduct.

(b) Under this regulation and Section 493 of the PHS Act, 42 U.S.C. 289b, each institution that applies for or receives PHS support for any biomedical or behavioral research or research training activity must comply with this part in responding to allegations of research misconduct occurring at or involving research or research training projects or staff of the institution.

(c) Research misconduct involving PHS support is contrary to the interests of the PHS and the Federal government and to the health and safety of the

public, to the integrity of research, and to the conservation of the public fisc.

(d) Institutions that apply for or receive PHS support and persons who work on PHS supported biomedical or behavioral research, biomedical or behavioral research training or activities related to that research or research training have an affirmative duty to protect those funds from misuse by ensuring the integrity of any research or research training activities related to the PHS support and by responding to allegations of research misconduct as provided in this part.

#### **§ 93.101 Purpose.**

The purpose of this part is to—

(a) Establish the responsibilities of HHS, PHS, the Office of Research Integrity (ORI), and institutions in responding to research misconduct issues;

(b) Define what constitutes misconduct in PHS supported research;

(c) Define the general types of administrative actions HHS and the PHS may take in response to research misconduct; and

(d) Require institutions to develop and implement policies and procedures for—

(1) Reporting and responding to allegations of research misconduct in connection with PHS supported research;

(2) Providing ORI with the assurances necessary to permit the institutions to participate in PHS supported research.

(e) Protect the health and safety of the public, promote the integrity of PHS supported research and the research process, and conserve the public fisc.

#### **§ 93.102 Applicability.**

(a) This part applies to allegations of research misconduct and research misconduct involving PHS supported biomedical or behavioral extramural and intramural research, biomedical or behavioral research training programs, or activities related to that research or research training. This includes any research proposed, performed, reviewed, or reported, or any research record generated from that research, regardless of whether the user or reviewer receives PHS support or whether an application or proposal for PHS funds resulted in a grant, contract, cooperative agreement, or other form of PHS support.

(b) This part does not supersede or establish an alternative to any existing regulations or procedures for handling fiscal improprieties, the ethical treatment of human or animal subjects, criminal matters, personnel actions against Federal employees, or actions

taken under the HHS debarment and suspension regulations at 45 CFR part 76 and 48 CFR subparts 9.4 and 309.4.

(c) This part does not prohibit or otherwise limit how institutions handle allegations of misconduct that do not fall within this part's definition of research misconduct or that do not involve PHS support.

#### **§ 93.103 Research misconduct.**

*Research misconduct* means fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results.

(a) Fabrication is making up data or results and recording or reporting them.

(b) Falsification is manipulating research materials, equipment, or processes, or changing or omitting data or results such that the research is not accurately represented in the research record.

(c) Plagiarism is the appropriation of another person's ideas, processes, results, or words without giving appropriate credit.

(d) Research misconduct does not include honest error or differences of opinion.

#### **§ 93.104 Requirements for findings of research misconduct.**

A finding of research misconduct made under this part requires that—

(a) There be a significant departure from accepted practices of the relevant research community; and

(b) The misconduct be committed intentionally, knowingly, or recklessly; and

(c) The allegation be proven by a preponderance of the evidence.

#### **§ 93.105 Time limitations.**

(a) *Six year limitation.* This part applies only to research misconduct occurring within six years before the date HHS or an institution receives an allegation of research misconduct.

(b) *Exceptions to the six year limitation.* Paragraph (a) of this section does not apply in the following instances:

(1) *Subsequent use exception.* The respondent continues or renews any incident of alleged research misconduct that occurred before the six year limitation through the use or republication of the fabricated, falsified, or plagiarized research record.

(2) *Health or safety of the public exception.* If ORI, or the institution following consultation with ORI, determines that the alleged misconduct, if it occurred, would possibly have a substantial adverse effect on the health or safety of the public.

(3) *“Grandfather” exception.* If HHS or an institution had the allegation of research misconduct under review or investigation on the effective date of this regulation.

#### **§ 93.106 Evidentiary standards.**

The following evidentiary standards apply to findings made under this part.

(a) *Burden of proof.* (1) The institution or HHS has the burden of proof for making a finding of research misconduct. The absence of, or respondent's failure to provide, research records adequately documenting the questioned research establishes a rebuttable presumption of research misconduct that may be relied upon by the institution or HHS in proving research misconduct. Credible evidence corroborating the research or providing a reasonable explanation for the absence of, or respondent's failure to provide, the research records may be used by the respondent to rebut this presumption.

(2) Once the institution or HHS makes a *prima facie* showing of research misconduct, the respondent has the burden of proving any affirmative defenses raised, including any honest error or differences of opinion and of proving any mitigating factors that the respondent wants the institution or HHS to consider in imposing administrative actions following research misconduct proceedings.

(b) *Standard of proof.* An institutional or HHS finding of research misconduct must be established by a preponderance of the evidence.

#### **§ 93.107 Rule of interpretation.**

Any interpretation of this part must further the policy and purpose of the PHS and the Federal government to protect the health and safety of the public, to promote the integrity of research, and to conserve the public fisc.

#### **§ 93.108 Confidentiality.**

(a) Disclosure of the identity of respondents and complainants in research misconduct proceedings is limited, to the extent possible, to those who need to know, consistent with a thorough, competent, objective and fair research misconduct proceeding, and as allowed by law. Provided, however, under section 93.517(g), PHS administrative hearings must be open to the public.

(b) Except as may otherwise be prescribed by applicable law, confidentiality must be maintained for any records or evidence from which research subjects might be identified. Disclosure is limited to those who have

a need to know to carry out a research misconduct proceeding.

#### **§ 93.109 Coordination with other agencies.**

(a) When more than one agency of the federal government has jurisdiction of the subject misconduct allegation, the agencies may coordinate responses to the allegation.

(b) In cases involving more than one agency, HHS may refer to evidence or reports developed by that agency if HHS determines that the evidence or reports will assist in resolving HHS issues. In appropriate cases, HHS will seek to resolve allegations jointly with the other agency or agencies.

### **Subpart B—Definitions**

#### **§ 93.200 Administrative action.**

*Administrative action* means—

(a) An HHS action in response to a research misconduct proceeding taken to protect the health and safety of the public, to promote the integrity of PHS supported research or research training, and to conserve the public fisc; or

(b) An HHS action in response either to a breach of a material provision of a settlement agreement in a research misconduct proceeding or to a breach of any HHS debarment or suspension.

#### **§ 93.201 Allegation.**

*Allegation* means a disclosure of possible research misconduct through any means of communication. The disclosure may be by written or oral statement or other communication to an institutional or HHS official.

#### **§ 93.202 Charge letter.**

*Charge letter* means the written notice, as well as any amendments to the notice, that are sent to the respondent stating the PHS deciding official's findings of research misconduct and any HHS administrative actions. If the charge letter includes a debarment or suspension action, it may be issued jointly by the deciding and debarring officials.

#### **§ 93.203 Complainant.**

*Complainant* means a person who in good faith makes an allegation of research misconduct.

#### **§ 93.204 Contract.**

*Contract* means an acquisition instrument awarded under the HHS Federal Acquisition Regulation (FAR), 48 CFR Chapter 1, excluding any small purchases awarded pursuant to FAR Part 13.

#### **§ 93.205 Debarment or suspension.**

*Debarment* or *suspension* means the Governmentwide exclusion, whether

temporary or for a set term, of a person from eligibility for Federal grants, contracts, and cooperative agreements under the HHS regulations at 45 CFR Part 76 (nonprocurement) and 48 CFR Subparts 9.4 and 309.4 (procurement).

#### **§ 93.206 Debarring official.**

*Debarring official* means an official authorized to impose debarment or suspension. The HHS debarring official is either—

(a) The Secretary; or

(b) An official designated by the Secretary.

#### **§ 93.207 Deciding official.**

*Deciding official* means an official authorized to make PHS findings of research misconduct and to impose HHS administrative actions. The deciding official is either—

(a) The Secretary; or

(b) An official designated by the Secretary.

#### **§ 93.208 Departmental Appeals Board or DAB.**

*Departmental Appeals Board* or *DAB* means, depending on the context—

(a) The organization, within the Office of the Secretary, established to conduct hearings and provide impartial review of disputed decisions made by HHS operating components; or

(b) An Administrative Law Judge (ALJ) at the DAB.

#### **§ 93.209 Evidence.**

*Evidence* means any document, tangible item, or testimony offered or obtained during a research misconduct proceeding that tends to prove or disprove the existence of an alleged fact.

#### **§ 93.210 Funding component.**

*Funding component* means any organizational unit of the PHS authorized to award grants, contracts, or cooperative agreements for any activity that involves the conduct of biomedical or behavioral research or research training, e.g., agencies, bureaus, centers, institutes, divisions, or offices and other awarding units within the PHS.

#### **§ 93.211 Good faith.**

*Good faith* means having a belief in the truth of one's allegation or testimony that a reasonable person in the complainant's or witness's position could have based on the information known to the complainant or witness at the time. An allegation or cooperation with a research misconduct proceeding is not in good faith if made with knowing or reckless disregard for information that would negate the allegation or testimony.

#### **§ 93.212 Hearing.**

*Hearing* means that part of the research misconduct proceeding from the time a respondent files a request for an administrative hearing to contest PHS findings of research misconduct and HHS administrative actions until the time the hearing officer issues a recommended decision.

#### **§ 93.213 Inquiry.**

*Inquiry* means preliminary information-gathering and preliminary fact-finding to determine whether an allegation or apparent instance of research misconduct has substance and if an investigation is warranted.

#### **§ 93.214 Institution.**

*Institution* means any individual or entity that applies for or receives PHS support for any activity or program that involves the conduct of biomedical or behavioral research, biomedical or behavioral research training, or activities related to that research or training. This includes, but is not limited to, colleges and universities, PHS intramural biomedical or behavioral research laboratories, research and development centers, national user facilities, industrial laboratories or other research institutes, small research institutions, and independent researchers.

#### **§ 93.215 Institutional member.**

*Institutional member* or *members* means a person who is employed by, is an agent of, or is affiliated by contract or agreement with an institution. Institutional members may include, but are not limited to, officials, teaching and support staff, researchers, clinical technicians, fellows, students, volunteers, agents, and contractors, subcontractors, and subawardees, and their employees.

#### **§ 93.216 Investigation.**

*Investigation* means the formal development of a factual record and the examination of that record leading to a decision not to make a finding of research misconduct or to a recommendation for a finding of research misconduct or other appropriate remedies, including administrative actions.

#### **§ 93.217 Notice.**

*Notice* means a written communication served in person, sent by mail or its equivalent to the last known street address, facsimile number or e-mail address of the addressee. Several sections of Subpart E have special notice requirements.

**§ 93.218 Office of Research Integrity or ORI.**

*Office of Research Integrity or ORI* means the office to which the HHS Secretary has delegated responsibility for addressing research integrity and misconduct issues related to PHS activities.

**§ 93.219 Person.**

*Person* means any individual, corporation, partnership, institution, association, unit of government, or legal entity, however organized.

**§ 93.220 Preponderance of the evidence.**

*Preponderance of the evidence* means proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

**§ 93.221 Prima facie showing.**

*Prima facie showing* means evidence that on its face is sufficient to establish research misconduct in the absence of respondent's presentation of substantial contradictory evidence.

**§ 93.222 Public Health Service or PHS.**

*Public Health Service or PHS* means the unit within the Department of Health and Human Services that includes the Office of Public Health and Science and the following Operating Divisions: Agency for Healthcare Research and Quality, Agency for Toxic Substances and Disease Registry, Centers for Disease Control and Prevention, Food and Drug Administration, Health Resources and Services Administration, Indian Health Service, National Institutes of Health, and the Substance Abuse and Mental Health Services Administration, and the offices of the Regional Health Administrators.

**§ 93.223 PHS support.**

*PHS support* means PHS funding, or applications or proposals therefor, for biomedical or behavioral research, biomedical or behavioral research training, or activities related to that research or training, that may be provided through: Funding for PHS intramural research; grants, cooperative agreements, or contracts; or subgrants, subcontracts, or other payments under grants, cooperative agreements, or contracts.

**§ 93.224 Research.**

*Research* means a systematic experiment, study, evaluation, demonstration or survey designed to develop or contribute to general knowledge (basic research) or specific knowledge (applied research) relating broadly to public health by establishing,

discovering, developing, elucidating or confirming information about, or the underlying mechanism relating to, biological causes, functions or effects, diseases, treatments, or related matters to be studied.

**§ 93.225 Research misconduct proceeding.**

*Research misconduct proceeding* means any actions related to alleged research misconduct taken under this part, including but not limited to, allegation assessments, inquiries, investigations, ORI oversight reviews, hearings, and administrative appeals.

**§ 93.226 Research record.**

*Research record* means the record of data or results that embody the facts resulting from scientific inquiry, including but not limited to, research proposals, laboratory records, both physical and electronic, progress reports, abstracts, theses, oral presentations, internal reports, journal articles, and any documents and materials provided to HHS or an institutional official by a respondent in response to questions about the research at issue.

**§ 93.227 Respondent.**

*Respondent* means the person against whom an allegation of research misconduct is directed or who is the subject of a research misconduct proceeding.

**§ 93.228 Retaliation.**

*Retaliation* for the purpose of this part means an adverse action taken against a complainant, witness, or committee member by an institution or one of its members in response to—

- (a) A good faith allegation of research misconduct; or
- (b) Good faith cooperation with a research misconduct proceeding.

**§ 93.229 Secretary or HHS.**

*Secretary or HHS* means the Secretary of HHS or any other officer or employee of the HHS to whom the Secretary delegates authority.

**Subpart C—Responsibilities of Institutions****Compliance and Assurances****§ 93.300 General responsibilities for compliance.**

Institutions under this part must—

- (a) Have written policies and procedures for conducting and reporting inquiries and investigations of alleged research misconduct in compliance with this part;
- (b) Respond to each allegation of research misconduct at the institution

involving PHS supported research in compliance with this part;

(c) Foster a research environment that promotes the responsible conduct of research and research training, discourages research misconduct, and deals promptly with allegations or evidence of possible research misconduct;

(d) Take all reasonable and practical steps to protect the positions and reputations of good faith complainants, witnesses and committee members and protect them from retaliation by respondents and other institutional members;

(e) Provide confidentiality to the extent required by § 93.108 to all respondents, complainants, and research subjects identifiable from research records or evidence;

(f) Take all reasonable and practical steps to ensure the cooperation of respondents and other institutional members with research misconduct proceedings, including, but not limited to, their providing information, research records, and evidence;

(g) Cooperate with HHS during any research misconduct proceeding or compliance review;

(h) Assist in administering and enforcing any HHS administrative actions imposed on its institutional members; and

(i) Have an active assurance of compliance.

**§ 93.301 Institutional assurances.**

(a) *General policy.* An institution with PHS supported biomedical or behavioral research, biomedical or behavioral research training or activities related to that research or training must provide PHS with an assurance of compliance with this part, satisfactory to the Secretary. PHS funding components may authorize funds for biomedical and behavioral research, research training, and related activities only to institutions that have approved assurances and required renewals on file with ORI.

(b) *Institutional Assurance.* The responsible institutional official must assure on behalf of the institution that the institution—

- (1) Has written policies and procedures in compliance with this part for inquiring into and investigating allegations of research misconduct; and
- (2) Complies with its own policies and procedures and the requirements of this part.

**§ 93.302 Institutional compliance with assurances.**

(a) *Compliance with assurance.* ORI considers an institution in compliance with its assurance if the institution—

(1) Establishes policies and procedures according to this part, keeps them in compliance with this part, and upon request, provides them to ORI and to other authorized HHS personnel;

(2) Takes all reasonable and practical specific steps to foster research integrity consistent with § 93.300, including—

(i) Informs the institution's research members participating in or otherwise involved with PHS supported biomedical or behavioral research, research training or related activities, including those applying for support from any PHS funding component, about its policies and procedures for responding to allegations of research misconduct, and the institution's commitment to compliance with the policies and procedures; and

(ii) Complies with its policies and procedures and each specific provision of this part.

(b) *Annual report.* An institution must file an annual report with ORI which contains information specified by ORI on the institution's compliance with this part.

(c) *Additional information.* Along with its assurance or annual report, an institution must send ORI other aggregated information on research misconduct proceedings and compliance with the requirements of this part that ORI may request.

#### **§ 93.303 Assurances for small institutions.**

(a) If an institution is too small to handle research misconduct proceedings, it may file a "Small Organization Statement" with ORI in place of the formal institutional policies and procedures required by § 93.301.

(b) By submitting a Small Organization Statement, the institution agrees to report all allegations of research misconduct to ORI. ORI or another appropriate HHS office will work with the institution to develop and implement a process for handling allegations of research misconduct consistent with this part.

(c) The Small Organization Statement does not relieve the institution from complying with any other provision of this part.

#### **§ 93.304 Institutional policies and procedures.**

Institutions seeking an approved assurance must have written policies and procedures for addressing research misconduct that include the following—

(a) Consistent with § 93.108, protection of the confidentiality of respondents, complainants, and research subjects identifiable from research records or evidence;

(b) A thorough, competent, objective, and fair response to allegations of

research misconduct consistent with and within the time limits of this part;

(c) Notice to the respondent, consistent with and within the time limits of this part;

(d) Written notice to ORI of any decision to open an investigation either within 30 days of the decision or before the date the investigation begins, whichever happens first;

(e) Opportunity for the respondent to provide written comments on the institution's inquiry report;

(f) Opportunity for the respondent to provide written comments on the draft report of the investigation, and provisions for the institutional investigation committee to consider and address the comments before issuing the final report;

(g) Protocols for handling the research record and evidence, including the requirements of § 93.305;

(h) Appropriate interim institutional actions to protect public health, Federal funds and equipment, and the integrity of the PHS supported research process;

(i) Notice to ORI under "§ 93.318 and notice of any facts that may be relevant to protect public health, Federal funds and equipment, and the integrity of the PHS supported research process;

(j) Institutional actions in response to final findings of research misconduct;

(k) All reasonable and practical efforts, if requested and as appropriate, to protect or restore the reputation of persons alleged to have engaged in research misconduct but against whom no finding of research misconduct is made;

(l) All reasonable and practical efforts to protect or restore the position and reputation of any complainant, witness, or committee member and to counter potential or actual retaliation against these complainants, witnesses, and committee members; and

(m) Full and continuing cooperation with ORI during its oversight review under Subpart D of this part or any subsequent administrative hearings or appeals under Subpart E of this part. This includes providing all research records and evidence under the institution's control, custody, or possession and access to all persons within its authority necessary to develop a complete record of relevant and material evidence.

#### **§ 93.305 Responsibility for maintenance and custody of research records and evidence.**

An institution, as the responsible legal entity for the PHS supported research, has a continuing obligation under this part to ensure that it maintains adequate records for a

research misconduct proceeding. The institution must—

(a) Either before or when the institution notifies the respondent of the allegation, inquiry or investigation, promptly take all reasonable and practical efforts to obtain custody of all the research records and evidence needed to conduct the research misconduct proceeding, inventory the records and evidence, and sequester them in a secure manner;

(b) Where appropriate, give the respondent copies of or reasonable, supervised access to the research records;

(c) Undertake all reasonable and practical efforts to take custody of additional research records or evidence that are discovered during the course of a research misconduct proceeding; and

(d) Maintain the research records and evidence until ORI requests them, HHS takes final action, or as required by § 93.317, as applicable.

#### **§ 93.306 Using a consortium or other entity for research misconduct proceedings.**

(a) If an institution is too small, is otherwise unable to respond to allegations of research misconduct because of real or apparent conflicts of interest, lacks the capacity, or otherwise prefers not to conduct its own research misconduct proceeding, it may use the services of a consortium or other entity qualified by practice and experience to conduct research misconduct proceedings.

(b) A consortium may be a group of institutions, professional organizations, or mixed groups which will conduct research misconduct proceedings for other institutions.

(c) A consortium or entity acting on behalf of an institution must follow the requirements of this part in conducting research misconduct proceedings.

#### **The Institutional Inquiry**

##### **§ 93.307 Institutional inquiry.**

(a) *Criteria warranting an inquiry.* An inquiry is warranted if the allegation—

(1) Falls within the definition of research misconduct under this part;

(2) Involves PHS supported research; and

(3) Is sufficiently credible and specific so that potential evidence of research misconduct may be identified.

(b) *Notice.* At the time of or before beginning an inquiry, an institution must make a good faith effort to notify in writing the presumed respondent, if any. If the inquiry subsequently identifies additional respondents, the institution must notify them.

(c) *Review of evidence.* The purpose of an inquiry is to conduct an initial review of the evidence to determine whether to conduct an investigation. Therefore, an inquiry does not require a full review of all the evidence related to the allegation.

(d) *Criteria warranting an investigation.* An inquiry's purpose is to decide if an allegation warrants an investigation. An investigation is warranted if there is—

(1) A reasonable basis for concluding that the allegation involves PHS supported research and falls within the PHS definition of research misconduct; and

(2) Preliminary information-gathering and preliminary fact-finding from the inquiry indicates that the allegation may have substance.

(e) *Inquiry report.* The institution must prepare a written report that meets the requirements of § 93.309.

(f) *Opportunity to comment.* The institution must provide the respondent an opportunity to review and comment on the inquiry report and attach any comments received to the report.

(g) *Time for completion.* The institution must complete the inquiry within 60 calendar days of its initiation unless circumstances clearly warrant a longer period. If the inquiry takes longer than 60 days to complete, the inquiry record must include documentation of the reasons for exceeding the 60-day period.

#### **§ 93.308 Notice of the results of the inquiry.**

(a) *Notice to respondent.* The institution must notify the respondent whether the inquiry found that an investigation is warranted. The notice must include a copy of the inquiry report and include or refer to a copy of this part and the institution's policies and procedures adopted under its assurance.

(b) *Notice to complainants.* The institution may notify the complainant who made the allegation whether the inquiry found that an investigation is warranted. The institution may provide relevant portions of the report to any complainant for comment.

#### **§ 93.309 Reporting to ORI on the decision to initiate an investigation.**

(a) Within 30 days of finding that an investigation is warranted, the institution must provide ORI with the written finding by the responsible institutional official and a copy of the inquiry report which includes the following information—

(1) The name and position of the respondent;

(2) A description of the allegations of research misconduct;

(3) The PHS support, including, for example, grant numbers, grant applications, contracts, and publications listing PHS support;

(4) The basis for recommending that the alleged actions warrant an investigation; and

(5) Any comments on the report by the respondent, complainant, or a witness.

(b) The institution must provide the following information to ORI on request—

(1) The institutional policies and procedures under which the inquiry was conducted;

(2) The research records and evidence reviewed, transcripts or recordings of any interviews, and copies of all relevant documents; and

(3) The charges for the investigation to consider.

(c) *Documentation of decision not to investigate.* Institutions must keep sufficiently detailed documentation of inquiries to permit a later assessment by ORI of the reasons why the institution decided not to conduct an investigation. Consistent with section 93.317, institutions must keep these records in a secure manner for at least 7 years after the termination of the inquiry, and upon request, provide them to ORI or other authorized HHS personnel.

(d) *Notification of special circumstances.* In accordance with § 93.318, institutions must notify ORI and other PHS agencies, as relevant, of any special circumstances that may exist.

#### **The Institutional Investigation**

##### **§ 93.310 Institutional investigation.**

Institutions conducting research misconduct investigations must:

(a) *Time.* Begin the investigation within 30 days after determining that an investigation is warranted.

(b) *Notice to ORI.* Notify the ORI Director of the decision to begin an investigation on or before the date the investigation begins and provide an inquiry report that meets the requirements of § 93.309.

(c) *Notice to the respondent.* Notify the respondent in writing of the allegations within a reasonable amount of time after determining that an investigation is warranted, but before the investigation begins. The institution must give the respondent written notice of any new allegations of research misconduct within a reasonable amount of time of deciding to pursue allegations not addressed during the inquiry or in the initial notice of investigation.

(d) *Custody of the records.* Take custody of and sequester any relevant research records and evidence needed to conduct the investigation not taken into custody at the allegation or inquiry stage. Whenever possible, the institution must take custody of the records—

(1) Before or at the time the institution notifies the respondent; and

(2) Whenever additional items become known or relevant to the investigation.

(e) *Documentation.* Use diligent efforts to ensure that the investigation is thorough and sufficiently documented and includes examination of all research records and evidence relevant to reaching a decision on the merits of the allegations.

(f) *Ensuring a fair investigation.* Take reasonable steps to ensure an impartial and unbiased investigation to the maximum extent practicable, including participation of persons with appropriate scientific expertise who do not have unresolved personal, professional, or financial conflicts of interest with those involved with the inquiry or investigation.

(g) *Interviews.* Interview each respondent, complainant, and any other available person who may have substantive information regarding any relevant aspects of the investigation, including witnesses identified by the respondent, and maintain detailed records. Record or transcribe each interview, provide the recording or transcript to the interviewee for correction, and include the recording or transcript in the record of the investigation.

(h) *Pursue leads.* Pursue diligently all significant issues and leads discovered, including any evidence of additional instances of possible research misconduct, and continue the investigation to completion.

##### **§ 93.311 Investigation time limits.**

(a) *Time limit for completing an investigation.* An institution must complete all aspects of an investigation within 120 days of beginning it, including conducting the investigation, preparing the report of findings, giving the draft report to the respondent for comment, and sending the final report to ORI under § 93.315.

(b) *Extension of time limit.* If unable to complete the investigation in 120 days, the institution must ask ORI for an extension in writing.

(c) If ORI grants an extension, it may direct the institution to file periodic progress reports.

**§ 93.312 Opportunity to comment on the investigation report.**

(a) The institution must give the respondent a copy of the draft investigation report for review and comment within 30 days of the respondent's receipt of the draft report; and

(b) The institution may provide relevant portions of the report to complainants for comment within 30 days of their receipt of the relevant portions of the report.

**§ 93.313 Institutional investigation report.**

The final institutional investigation report must be in writing and include:

(a) *Allegations.* Describe the nature of the allegations of research misconduct.

(b) *PHS support.* Describe and document the PHS support, including, for example, any grant numbers, grant applications, contracts, and publications listing PHS support.

(c) *Institutional charge.* Describe the specific allegations of research misconduct for consideration in the investigation.

(d) *Policies and procedures.* If not already provided to ORI with the inquiry report, include the institutional policies and procedures under which the investigation was conducted.

(e) *Research records and evidence.* Identify and summarize the research records and evidence reviewed, and identify any evidence taken into custody but not reviewed.

(f) *Statement of findings.* For each separate allegation of research misconduct identified during the investigation, provide a finding as to whether research misconduct did or did not occur, and if so—

(1) Identify whether the research misconduct was falsification, fabrication, or plagiarism, and if it was intentional, knowing, or in reckless disregard;

(2) Summarize the facts and the analysis which support the conclusion and consider the merits of any reasonable explanation by the respondent;

(3) Identify the specific PHS support;

(4) Identify whether any publications need correction or retraction;

(5) Identify the person(s) responsible for the misconduct; and

(6) List any current support or known applications or proposals for support that the respondent has pending with non-PHS Federal agencies.

(g) *Comments.* Include and consider any comments made by the respondent and complainant on the draft investigation report.

(h) *Maintain and provide records.* Maintain and provide to ORI upon

request all relevant research records, including results of all interviews and the transcripts or recordings of such interviews.

**§ 93.314 Institutional appeals.**

(a) While not required by this part, if the institution's procedures provide for appeal by the respondent, the institution must complete any appeals within 120 days of filing the appeal.

(b) If unable to complete any appeals within 120 days, the institution must ask ORI for an extension in writing and provide an explanation for the request.

(c) ORI may grant requests for extension for good cause. If ORI grants an extension, it may direct the institution to file periodic progress reports.

**§ 93.315 Notice to ORI of institutional findings and actions.**

The institution must give ORI the following:

(a) *Investigation Report.* Include a copy of the report, all attachments, and any appeals.

(b) *Final institutional action.* State whether the institution found research misconduct, and if so, who committed the misconduct.

(c) *Findings.* State whether the institution accepts the investigation's findings.

(d) *Institutional administrative actions.* Describe any pending or completed administrative actions against the respondent.

**§ 93.316 Completing the research misconduct process.**

(a) ORI expects institutions to carry inquiries and investigations through to completion and to pursue diligently all significant issues. If an institution plans to end an inquiry or investigation before completion for any reason, including an admission of misconduct by the respondent, it must contact ORI before closing the case and submitting its final report.

(b) After review of an institution's decision to end an inquiry or investigation before completion, ORI may direct the institution to complete its process or refer the matter for further investigation by HHS.

**Other Institutional Responsibilities****§ 93.317 Retention and custody of the research misconduct proceeding record.**

(a) *Maintenance of record.* Institutions must maintain records of research misconduct proceedings in a secure manner for 7 years after their completion or the completion of any PHS proceeding involving the research misconduct allegation under subparts D and E of this part, whichever is later.

(b) *Provision for HHS custody.* On request, institutions must transfer custody of or provide copies to HHS, of any institutional record relevant to a research misconduct allegation covered by this part, including the research records and evidence, to perform forensic or other analyses or as otherwise needed to conduct an HHS inquiry or investigation or for ORI to conduct its review or to present evidence in any PHS proceeding under subparts D and E of this part.

**§ 93.318 Notifying ORI of special circumstances.**

At any time during a research misconduct proceeding, as defined in section 93.225, an institution must notify ORI immediately if it has reason to believe that any of the following conditions exist:

(a) Health or safety of the public is at risk, including an immediate need to protect human or animal subjects.

(b) HHS resources or interests are threatened.

(c) Research activities should be suspended.

(d) There is reasonable indication of possible violations of civil or criminal law.

(e) Federal action is required to protect the interests of those involved in the research misconduct proceeding.

(f) The research institution believes the research misconduct proceeding may be made public prematurely so that HHS may take appropriate steps to safeguard evidence and protect the rights of those involved.

(g) The research community or public should be informed.

**§ 93.319 Institutional standards.**

(a) Institutions may have internal standards of conduct different from the PHS standards for research misconduct under this part. Therefore, an institution may find conduct to be actionable under its standards even if the action does not meet this part's definition of research misconduct.

(b) An HHS finding or settlement does not affect institutional findings or administrative actions based on an institution's internal standards of conduct.

**Subpart D—Responsibilities of the U.S. Department of Health and Human Services****General Information****§ 93.400 General statement of ORI authority.**

(a) *ORI review.* ORI may respond directly to any allegation of research misconduct at any time before, during,

or after an institution's response to the matter. The ORI response may include, but is not limited to—

(1) Conducting allegation assessments;

(2) Determining independently if PHS or HHS jurisdiction exists under this part in any matter;

(3) Forwarding allegations of research misconduct to the appropriate institution or HHS component for inquiry or investigation;

(4) Recommending that HHS should perform an inquiry or investigation or issue findings and taking all appropriate actions in response to the inquiry, investigation, or findings;

(5) Notifying or requesting assistance and information from PHS funding components or other affected Federal and state offices and agencies or institutions;

(6) Reviewing an institution's findings and process; and

(7) Making recommendations to the HHS deciding or debarring officials.

(b) *Requests for information.* ORI may request clarification or additional information, documentation, research records, or evidence from an institution or its members or other persons or sources to carry out ORI's review.

(c) *HHS administrative actions.*

(1) In response to a research misconduct proceeding, ORI may propose HHS administrative actions against any person to the HHS deciding official and implement the actions.

(2) ORI may propose to the HHS debarring official that a person be suspended or debarred from receiving Federal funds and may propose to other appropriate PHS components the implementation of HHS administrative actions within the components' authorities.

(d) *ORI assistance to institutions.* At any time, ORI may provide information, technical assistance, and procedural advice to institutional officials as needed regarding an institution's participation in research misconduct proceedings.

(e) *Review of institutional assurances.* ORI may review institutional assurances and policies and procedures for compliance with this part.

(f) *Institutional compliance.* ORI may make findings and impose HHS administrative actions related to an institution's compliance with this part and with its policies and procedures, including an institution's participation in research misconduct proceedings.

#### **§ 93.401 Communications with other offices and interim actions.**

(a) ORI may notify and consult with other Federal agencies at any time if it

has a reason to believe that a research misconduct proceeding may involve that agency. If ORI believes that a criminal or civil fraud violation may have occurred, it shall promptly refer the matter to the Department of Justice, the HHS Inspector General, or other appropriate investigative body.

(b) ORI may notify affected PHS offices and funding components at any time to permit them to make appropriate interim responses to protect the health and safety of the public, to promote the integrity of the PHS supported research and research process, and to conserve the public fisc.

(c) The information provided will not be disclosed as part of the peer review and advisory committee review processes, but may be used by the Secretary in making decisions about the award or continuation of funding.

#### **Research Misconduct Issues**

##### **§ 93.402 ORI allegation assessments.**

(a) When ORI receives an allegation of research misconduct directly or becomes aware of an allegation or apparent instance of research misconduct, it may conduct an initial assessment or refer the matter to the relevant institution for an assessment, inquiry, or other appropriate actions.

(b) If ORI conducts an assessment, it considers whether the allegation of research misconduct appears to fall within the definition of research misconduct, appears to involve PHS supported research, and whether it is sufficiently specific so that potential evidence may be identified and sufficiently substantive to warrant an inquiry. ORI may review all readily accessible, relevant information related to the allegation.

(c) If ORI decides that an inquiry is warranted, it forwards the matter to the appropriate institution or HHS component.

(d) If ORI decides that an inquiry is not warranted, it may close the case.

(e) ORI may forward allegations that do not fall within the jurisdiction of this part to the appropriate HHS component, Federal or State agency, institution, or other appropriate entity.

##### **§ 93.403 ORI review of research misconduct proceedings.**

ORI may conduct reviews of research misconduct proceedings. In conducting its review, ORI may—

(a) Determine whether there is PHS jurisdiction under this part;

(b) Consider any reports, institutional findings, research records, and evidence;

(c) Determine if the institution conducted the proceedings in a timely

manner with sufficient objectivity, thoroughness, and competence to support the conclusions;

(d) Obtain additional information or materials from the institution, the respondent, complainants, or other persons or sources;

(e) Conduct additional analyses and develop evidence;

(f) Decide whether research misconduct occurred, and if so who committed it;

(g) Recommend appropriate research misconduct findings and administrative actions; and

(h) Take any other actions necessary to complete HHS' review.

##### **§ 93.404 HHS findings on research misconduct proceedings.**

After completing its review, ORI either closes the case without a finding of research misconduct or recommends that HHS—

(a) Make findings of research misconduct and impose HHS administrative actions based on the record of the research misconduct proceedings and any other information obtained by ORI during its review; or

(b) Accept a proposed settlement.

##### **§ 93.405 Notifying the respondent of findings of research misconduct and HHS administrative actions.**

(a) When the PHS makes a finding of research misconduct or seeks to impose or enforce HHS administrative actions, it notifies the respondent in a charge letter. This letter includes the PHS findings of research misconduct and the basis for them and any HHS administrative actions. The letter also advises the respondent of the opportunity to contest the findings and administrative actions under Subpart E of this part.

(b) The PHS sends the charge letter by certified mail or a private delivery service to the last known address of the respondent or the last known principal place of business of the respondent's attorney.

(c) In cases involving a debarment or suspension action, the HHS debarring official notifies the respondent. At the discretion of the debarring official, this notice may be combined with the charge letter in paragraph (a) of this section.

##### **§ 93.406 Final HHS actions.**

Unless the respondent seeks to contest the charge letter under subpart E of this part, the deciding official's decision is HHS' final action on the PHS research misconduct issues and the HHS administrative actions, except that the debarring official's decision is the final HHS action on any debarment or suspension actions.

**§ 93.407 HHS administrative actions.**

(a) In response to a research misconduct proceeding, HHS may impose HHS administrative actions that include but are not limited to:

- (1) Clarification, correction, or retraction of the research record.
- (2) Letters of reprimand.
- (3) Imposition of special certification or assurance requirements to ensure compliance with applicable regulations or terms of PHS grants, contracts, or cooperative agreements.
- (4) Suspension or termination of a PHS grant, contract, or cooperative agreement.
- (5) Restriction on specific activities or expenditures under an active PHS grant, contract, or cooperative agreement.
- (6) Special review of all requests for PHS funding.
- (7) Imposition of supervision requirements on a PHS grant, contract, or cooperative agreement.
- (8) Certification of attribution or authenticity in all requests for support and reports to the PHS.
- (9) No participation in any advisory capacity to the PHS.
- (10) Adverse personnel action if the respondent is a Federal employee, in compliance with relevant Federal personnel policies and laws.

(11) Suspension or debarment under 45 CFR Part 76, 48 CFR subparts 9.4 and 309.4., or both.

(b) In connection with findings of research misconduct, HHS also may seek to recover funds spent on PHS supported biomedical or behavioral research, research training or related activities.

(c) Any authorized HHS component may impose, administer, or enforce HHS administrative actions separately or in coordination with other HHS components, including, but not limited to, ORI, the Office of Inspector General, the PHS funding component, and the debarring official.

**§ 93.408 Mitigating and aggravating factors in HHS administrative actions.**

The purpose of HHS administrative actions is remedial. The appropriate administrative action is commensurate with the seriousness of the misconduct, and the need to protect the health and safety of the public, promote the integrity of the PHS supported research and research process, and conserve the public fisc. PHS considers aggravating and mitigating factors in determining appropriate HHS administrative actions and their terms. PHS may consider other factors as appropriate in each case. The existence or nonexistence of any factor is not determinative:

(a) *Knowing, intentional, or reckless.* Were the respondent's actions knowing

or intentional or was the conduct reckless?

(b) *Pattern.* Was the research misconduct an isolated event or part of a continuing or prior pattern of dishonest conduct?

(c) *Impact.* Did the misconduct have significant impact on the proposed or reported research record, research subjects, other researchers, institutions, or the public health or welfare?

(d) *Acceptance of responsibility.* Has the respondent accepted responsibility for the misconduct by—

- (1) Admitting the conduct;
- (2) Cooperating with the research misconduct proceedings;
- (3) Demonstrating remorse and awareness of the significance and seriousness of the research misconduct; and

(4) Taking steps to correct or prevent the recurrence of the research misconduct.

(e) *Failure to accept responsibility.* Does the respondent blame others rather than accepting responsibility for the actions?

(f) *Retaliation.* Did the respondent retaliate against complainants, witnesses, committee members, or other persons?

(g) *Present responsibility.* Is the respondent presently responsible to conduct PHS supported research?

(h) *Other factors.* Other factors appropriate to the circumstances of a particular case.

**§ 93.409 Settlement of research misconduct proceedings.**

(a) HHS may settle a research misconduct proceeding at any time it concludes that settlement is in the best interests of the Federal government and the public health or welfare.

(b) Settlement agreements are publicly available, regardless of whether the PHS made a finding of research misconduct.

**§ 93.410 Final HHS action with no settlement or finding of research misconduct.**

When the final HHS action does not result in a settlement or finding of research misconduct, ORI may:

(a) Provide written notice to the respondent, the relevant institution, the complainant, and HHS officials.

(b) Take any other actions authorized by law.

**§ 93.411 Final HHS action with settlement or finding of research misconduct.**

When a final HHS action results in a settlement or research misconduct finding, ORI may:

(a) Provide final notification of any PHS research misconduct findings and HHS administrative actions to the

respondent, the relevant institution, the complainant, and HHS officials. The debarring official may provide a separate notice of final HHS action on any debarment or suspension actions.

(b) Identify publications which require correction or retraction and prepare and send a notice to the relevant journal.

(c) Publish notice of the research misconduct findings.

(d) Notify the respondent's current employer.

(e) Take any other actions authorized by law.

**Institutional Compliance Issues****§ 93.412 Making decisions on institutional noncompliance.**

(a) Institutions must foster a research environment that discourages misconduct in all research and that deals forthrightly with possible misconduct associated with PHS supported research.

(b) ORI may decide that an institution is not compliant with this part if the institution shows a disregard for, or inability or unwillingness to implement and follow the requirements of this part and its assurance. In making this decision, ORI may consider, but is not limited to, the following factors—

(1) Failure to establish and comply with policies and procedures under this part;

(2) Failure to respond appropriately when allegations of research misconduct arise;

(3) Failure to report to ORI all investigations and findings of research misconduct under this part;

(4) Failure to cooperate with ORI's review of research misconduct proceedings; or

(5) Other actions or omissions that have a material, adverse effect on reporting and responding to allegations of research misconduct.

**§ 93.413 HHS compliance actions.**

(a) An institution's failure to comply with its assurance and the requirements of this part may result in enforcement action against the institution.

(b) ORI may address institutional deficiencies through technical assistance if the deficiencies do not substantially affect compliance with this part.

(c) If an institution fails to comply with its assurance and the requirements of this part, HHS may take some or all of the following compliance actions:

(1) Issue a letter of reprimand.

(2) Direct that research misconduct proceedings be handled by HHS.

(3) Place the institution on special review status.

(4) Place information on the institutional noncompliance on the ORI web site.

(5) Require the institution to take corrective actions.

(6) Require the institution to adopt and implement an institutional integrity agreement.

(7) Recommend that HHS debar or suspend the entity.

(8) Any other action appropriate to the circumstances.

(d) If the institution's actions constitute a substantial or recurrent failure to comply with this part, ORI may also revoke the institution's assurance under §§ 93.301 or 93.303.

(e) ORI may make public any findings of institutional noncompliance and HHS compliance actions.

#### Disclosure of Information

##### § 93.414 Notice.

(a) ORI may disclose information to other persons for the purpose of providing or obtaining information about research misconduct as permitted under the Privacy Act, 5 U.S.C. 552a.

(b) ORI may publish notice of final agency findings of research misconduct, settlements, and HHS administrative actions and release and withhold information as permitted by the Privacy Act and the Freedom of Information Act, 5 U.S.C. 552.

#### Subpart E—Opportunity To Contest PHS Findings of Research Misconduct and HHS Administrative Actions

##### General Information

##### § 93.500 General policy.

(a) This subpart provides a respondent an opportunity to contest PHS findings of research misconduct and HHS administrative actions arising under 42 U.S.C. 289b in connection with PHS supported biomedical and behavioral research, research training, or activities related to that research or research training.

(b) A respondent has an opportunity to contest PHS research misconduct findings and HHS administrative actions made under this part by requesting an administrative hearing before an Administrative Law Judge (ALJ) affiliated with the HHS DAB, when the PHS has—

(1) Made a finding of research misconduct against a respondent; or

(2) Proposed HHS administrative actions other than debarment or suspension against a respondent.

(c) A respondent has an opportunity to contest a debarment or suspension action related to this part under the HHS debarment and suspension

regulations. However, nothing in this subpart modifies, alters, or changes any rights provided under the HHS debarment and suspension regulations at 45 CFR Part 76, subpart C and 48 CFR Parts 9.4 and 309.4.

(d) The ALJ's ruling on the merits of the PHS research misconduct findings and the HHS administrative actions constitutes a recommended decision to the Assistant Secretary for Health. The Assistant Secretary for Health may modify, affirm, or reject the ALJ's ruling in whole or in part. The Assistant Secretary for Health's decision is final and becomes binding on the date the final decision is issued.

(e) The decision of the ALJ constitutes a recommendation to the HHS debarment official in a debarment or suspension action. The debarment official may reject any resultant findings in whole or in part, only after specifically determining them to be arbitrary, capricious, or clearly erroneous.

##### § 93.501 Opportunity to contest PHS findings of research misconduct and HHS administrative actions.

(a) *Opportunity to contest.* A respondent may contest PHS findings of research misconduct and any HHS administrative actions, including any debarment or suspension action related to this part, by requesting a hearing within 30 days of receipt of the charge letter or other written notice provided under § 93.405.

(b) *Form of a request for hearing.* The respondent's request for a hearing must be—

(1) In writing;

(2) Signed by the respondent or by the respondent's attorney; and

(3) Sent by certified mail, or other equivalent (*i.e.*, with a verified method of delivery), to the DAB Chair and served on ORI.

(c) *Contents of a request for hearing.* The request for a hearing must—

(1) Admit or deny each PHS finding of research misconduct and each factual assertion made by PHS in support of the finding;

(2) Accept or challenge each proposed HHS administrative action;

(3) Provide detailed, substantive reasons for each denial or challenge;

(4) Identify any legal issues or defenses that the respondent intends to raise during the proceeding; and

(5) Identify any mitigating factors that the respondent intends to prove.

(d) *Extension for good cause to supplement the hearing request.*

(1) For good cause shown, the ALJ may grant an additional period of no more than 60 days from the respondent's receipt of the charge letter

or other written notice provided under § 93.405 to permit the respondent to supplement the hearing request to comply fully with the requirements of subsection (c).

(2) Good cause means circumstances beyond the control of the respondent or respondent's representative and not attributable to neglect or administrative inadequacy.

#### Hearing Process

##### § 93.502 Appointment of the Administrative Law Judge and scientific expert.

(a) Within 30 days of receiving a request for a hearing, the DAB Chair, in consultation with the Chief Administrative Law Judge, must designate an Administrative Law Judge to conduct the hearing.

(b) The ALJ may retain one or more persons with appropriate scientific or technical expertise to assist the ALJ in evaluating scientific issues related to the PHS findings of research misconduct. At the request of either party, the ALJ must retain such an expert.

(c) No ALJ, or person hired or appointed to assist the ALJ, may serve in any proceeding under this subpart if he or she has any real or apparent conflict of interest that might reasonably impair his or her objectivity in the proceeding.

(d) Any party to the proceeding may request the ALJ or scientific expert to withdraw from the proceeding because of a real or apparent conflict of interest under paragraph (c) of this section. The motion to disqualify must be timely and state with particularity the grounds for disqualification. The ALJ may rule upon the motion or certify it to the Chief ALJ for decision. If the hearing officer rules upon the motion, either party may appeal the decision to the Chief ALJ.

(e) An ALJ must withdraw from any proceeding for any reason found by the ALJ or Chief ALJ to be disqualifying.

##### § 93.503 Grounds for granting a hearing request.

(a) The ALJ must grant a respondent's hearing request if the ALJ determines there is a genuine dispute over facts material to the PHS findings of research misconduct or HHS administrative actions, including any debarment or suspension action, if the debarment official has referred the matter to the hearing officer. The respondent's general denial or assertion of error for each PHS finding of research misconduct, and any basis for the finding, or for any HHS administrative actions in the charge letter, is not sufficient to establish a genuine dispute.

(b) The hearing request must specifically deny each PHS finding of research misconduct in the charge letter, each basis for the finding and each HHS administrative action in the charge letter, or it is considered an admission by the respondent. If the hearing request does not specifically dispute the HHS administrative actions, including any debarment or suspension actions, they are considered accepted by the respondent.

(c) If the respondent does not request a hearing within the 30-day time period, the PHS finding(s) and any HHS administrative action(s), including any debarment or suspension actions, become final agency actions at the expiration of the 30-day period.

(d) If the ALJ grants the hearing request, the respondent may waive the opportunity for any in-person proceeding, and the ALJ may review and decide the case on the basis of the administrative record. The ALJ may grant a respondent's request that waiver of the in-person proceeding be conditioned upon the opportunity for respondent to file additional pleadings and documentation. ORI may also supplement the administrative record through pleadings, documents, in-person or telephonic testimony, and oral presentations.

#### **§ 93.504 Grounds for dismissal of a hearing request.**

(a) The ALJ must dismiss a hearing request if the respondent—

(1) Does not file the request within 30 days after receiving the charge letter;

(2) Does not raise a genuine dispute over facts or law material to the PHS findings of research misconduct and any HHS administrative actions, including debarment and suspension actions in the hearing request or in any extension to supplement granted by the ALJ under § 93.501(d);

(3) Does not raise any issue which may properly be addressed in a hearing;

(4) Withdraws or abandons the hearing request; or

(b) The ALJ may dismiss a hearing request if the respondent fails to provide ORI with notice in the form and manner required by § 93.501.

#### **§ 93.505 Rights of the parties.**

(a) The parties to the hearing are the respondent and ORI. The investigating institution is not a party to the case, unless it is a respondent.

(b) Except as otherwise limited by this subpart, the parties may—

(1) Be accompanied, represented, and advised by an attorney;

(2) Participate in any case-related conference held by the ALJ;

(3) Conduct discovery of documents and other tangible items;

(4) Agree to stipulations of fact or law that must be made part of the record;

(5) File motions in writing before the hearing officer;

(6) Present evidence relevant and material to the issues at the hearing;

(7) Present and cross-examine witnesses;

(8) Present oral arguments;

(9) Submit written post-hearing briefs, proposed findings of fact and conclusions of law, and reply briefs within reasonable time frames agreed upon by the parties or established by the hearing officer as provided in § 93.522; and

(10) Submit materials to the ALJ and other parties under seal, or in redacted form, when necessary, to protect the confidentiality of any information contained in them consistent with this part, the Privacy Act, the Freedom of Information Act, or other Federal law or regulation.

#### **§ 93.506 Authority of the Administrative Law Judge.**

(a) The ALJ assigned to the case must conduct a fair and impartial hearing, avoid unnecessary delay, maintain order, and assure that a complete and accurate record of the proceeding is properly made. The ALJ is bound by all Federal laws and regulations. In conducting the proceeding, the ALJ must comply with all Secretarial delegations of authority and applicable HHS policies. The ALJ has the authorities set forth in this part.

(b) Subject to review as provided elsewhere in this subpart, the ALJ may—

(1) Set and change the date, time, schedule, and place of the hearing upon reasonable notice to the parties;

(2) Continue or recess the hearing in whole or in part for a reasonable period of time;

(3) Hold conferences with the parties to identify or simplify the issues, or to consider other matters that may aid in the prompt disposition of the proceeding;

(4) Administer oaths and affirmations;

(5) Require the attendance of witnesses at a hearing;

(6) Rule on motions and other procedural matters;

(7) Require the production of documents and regulate the scope and timing of documentary discovery as permitted by this part;

(8) Require each party before the hearing to provide the other party and the hearing officer with copies of any exhibits that the party intends to introduce into evidence;

(9) Issue a ruling, after an *in camera* inspection if necessary, to address the disclosure of any evidence or portion of evidence for which confidentiality is requested under this part or other Federal law or regulation, or which a party submitted under seal;

(10) Regulate the course of the hearing and the conduct of representatives, parties, and witnesses;

(11) Examine witnesses and receive evidence presented at the hearing;

(12) Admit, exclude, or limit evidence offered by a party;

(13) Hear oral arguments on facts or law during or after the hearing;

(14) Upon motion of a party, take judicial notice of facts;

(15) Upon motion of a party, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact;

(16) Conduct any conference or oral argument in person, by telephone, or by audio-visual communication;

(17) Take action against any party for failing to follow an order or procedure or for disruptive conduct.

(c) The ALJ does not have the authority to—

(1) Enter an order in the nature of a directed verdict;

(2) Compel settlement negotiations; or

(3) Enjoin any act of the Secretary.

#### **§ 93.507 Ex parte communications.**

(a) No party, attorney, or other party representative may communicate *ex parte* with the ALJ on any matter at issue in a case, unless both parties have notice and an opportunity to participate in the communication. However, a party, attorney, or other party representative may communicate with DAB staff about administrative or procedural matters.

(b) If an *ex parte* communication occurs, the ALJ will disclose it to the other party and make it part of the record after the other party has an opportunity to comment.

(c) The provisions of this section do not apply to communications between an employee or contractor of the DAB and the ALJ.

#### **§ 93.508 Filing, forms, and service.**

(a) *Filing.*

(1) Unless the ALJ provides otherwise, all submissions required or authorized to be filed in the proceeding must be filed with the ALJ.

(2) Submissions are considered filed when they are placed in the mail, transmitted to a private delivery service for the purpose of delivering the item to the ALJ, or submitted in another manner authorized by the ALJ.

(b) *Forms.*

(1) Unless the ALJ provides otherwise, all submissions filed in the proceeding must include an original and two copies. The ALJ may designate the format for copies of nondocumentary materials such as videotapes, computer disks, or physical evidence. This provision does not apply to the charge letter or other written notice provided under § 93.405.

(2) Every submission filed in the proceeding must include the title of the case, the docket number, and a designation of the nature of the submission, such as a "Motion to Compel the Production of Documents" or "Respondent's Proposed Exhibits."

(3) Every submission filed in the proceeding must be signed by and contain the address and telephone number of the party on whose behalf the document or paper was filed, or the attorney of record for the party.

(c) *Service.* A party filing a submission with the ALJ must, at the time of filing, serve a copy on the other party. Service may be made either to the last known principal place of business of the party's attorney if the party is represented by an attorney, or, if not, to the party's last known address. Service may be made by—

- (1) Certified mail;
- (2) First-class postage prepaid U.S. Mail;
- (3) A private delivery service;
- (4) Hand-delivery; or
- (5) Facsimile or other electronic means if permitted by the ALJ.

(d) *Proof of service.* Each party filing a document or paper with the ALJ must also provide proof of service at the time of the filing. Any of the following items may constitute proof of service:

- (1) A certified mail receipt returned by the postal service with a signature;
- (2) An official record of the postal service or private delivery service;
- (3) A certificate of service stating the method, place, date of service, and person served that is signed by an individual with personal knowledge of these facts; or
- (4) Other proof authorized by the ALJ.

#### § 93.509 Computation of time.

(a) In computing any period of time under this part for filing and service or for responding to an order issued by the ALJ, the computation begins with the day following the act or event, and includes the last day of the period unless that day is a Saturday, Sunday, or legal holiday observed by the Federal government, in which case it includes the next business day.

(b) When the period of time allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays

observed by the Federal government must be excluded from the computation.

(c) Where a document has been filed by placing it in the mail, an additional 5 days must be added to the time permitted for any response. This paragraph does not apply to a respondent's request for hearing under § 93.501.

(d) Except for the respondent's request for a hearing, the ALJ may modify the time for the filing of any document or paper required or authorized under the rules in this part to be filed for good cause shown. When time permits, notice of a party's request for extension of the time and an opportunity to respond must be provided to the other party.

#### § 93.510 Filing motions.

(a) Parties must file all motions and requests for an order or ruling with the ALJ, serve them on the other party, state the nature of the relief requested, provide the legal authority relied upon, and state the facts alleged.

(b) All motions must be in writing except for those made during a prehearing conference or at the hearing.

(c) Within 10 days after being served with a motion, or other time as set by the ALJ, a party may file a response to the motion. The moving party may not file a reply to the responsive pleading unless allowed by the ALJ.

(d) The ALJ may not grant a motion before the time for filing a response has expired, except with the parties' consent or after a hearing on the motion. However, the ALJ may overrule or deny any motion without awaiting a response.

(e) The ALJ must make a reasonable effort to dispose of all motions promptly, and, whenever possible, dispose of all outstanding motions before the hearing.

#### § 93.511 Prehearing conferences.

(a) The ALJ must schedule an initial prehearing conference with the parties within 30 days of the DAB Chair's assignment of the case.

(b) The ALJ may use the initial prehearing conference to discuss—

- (1) Identification and simplification of the issues, specification of disputes of fact and their materiality to the PHS findings of research misconduct and any HHS administrative actions, and amendments to the pleadings, including any need for a more definite statement;
- (2) Stipulations and admissions of fact including the contents, relevancy, and authenticity of documents;
- (3) Respondent's waiver of an administrative hearing, if any, and submission of the case on the basis of

the administrative record as provided in § 93.503(d);

(4) Identification of legal issues and any need for briefing before the hearing;

(5) Identification of evidence, pleadings, and other materials, if any, that the parties should exchange before the hearing;

(6) Identification of the parties' witnesses, the general nature of their testimony, and the limitation on the number of witnesses and the scope of their testimony;

(7) Scheduling dates such as the filing of briefs on legal issues identified in the charge letter or the respondent's request for hearing, the exchange of witness lists, witness statements, proposed exhibits, requests for the production of documents, and objections to proposed witnesses and documents;

(8) Scheduling the time, place, and anticipated length of the hearing; and

(9) Other matters that may encourage the fair, just, and prompt disposition of the proceedings.

(c) The ALJ may schedule additional prehearing conferences as appropriate, upon reasonable notice to or request of the parties.

(d) All prehearing conferences will be audio-taped with copies provided to the parties upon request.

(e) Whenever possible, the ALJ must memorialize in writing any oral rulings within 10 days after the prehearing conference.

(f) By 15 days before the scheduled hearing date, the ALJ must hold a final prehearing conference to resolve to the maximum extent possible all outstanding issues about evidence, witnesses, stipulations, motions and all other matters that may encourage the fair, just, and prompt disposition of the proceedings.

#### § 93.512 Discovery.

(a) *Request to provide documents.* A party may only request another party to produce documents or other tangible items for inspection and copying that are relevant and material to the issues identified in the charge letter and in the respondent's request for hearing.

(b) *Meaning of documents.* For purposes of this subpart, the term documents includes information, reports, answers, records, accounts, papers, tangible items, and other data and documentary evidence. This subpart does not require the creation of any document. However, requested data stored in an electronic data storage system must be produced in a form reasonably accessible to the requesting party.

(c) *Nondisclosable items.* This section does not authorize the disclosure of—

(1) Interview reports or statements obtained by any party, or on behalf of any party, of persons whom the party will not call as witness in its case-in-chief;

(2) Analyses and summaries prepared in conjunction with the inquiry, investigation, ORI oversight review, or litigation of the case; or

(3) Any privileged documents, including but not limited to those protected by the attorney-client privilege, attorney-work product doctrine, or Federal law or regulation.

(d) *Responses to a discovery request.* Within 30 days of receiving a request for the production of documents, a party must either fully respond to the request, submit a written objection to the discovery request, or seek a protective order from the ALJ. If a party objects to a request for the production of documents, the party must identify each document or item subject to the scope of the request and state the basis of the objection for each document, or any part that the party does not produce.

(1) Within 30 days of receiving any objections, the party seeking production may file a motion to compel the production of the requested documents.

(2) The ALJ may order a party to produce the requested documents for *in camera* inspection to evaluate the merits of a motion to compel or for a protective order.

(3) The ALJ must compel the production of a requested document and deny a motion for a protective order, unless the requested document is—

(i) Not relevant or material to the issues identified in the charge letter or the respondent's request for hearing;

(ii) Unduly costly or burdensome to produce;

(iii) Likely to unduly delay the proceeding or substantially prejudice a party;

(iv) Privileged, including but not limited to documents protected by the attorney-client privilege, attorney-work product doctrine, or Federal law or regulation; or

(v) Collateral to issues to be decided at the hearing.

(4) If any part of a document is protected from disclosure under paragraph (d)(3) of this section, the ALJ must redact the protected portion of a document before giving it to the requesting party.

(5) The party seeking discovery has the burden of showing that the ALJ should allow it.

(e) *Refusal to produce items.* If a party refuses to provide requested documents when ordered by the hearing officer, the ALJ may take corrective action, including but not limited to, ordering

the non-compliant party to submit written answers under oath to written interrogatories posed by the other party or taking any of the actions at § 93.515.

#### **§ 93.513 Submission of witness lists, witness statements, and exhibits.**

(a) By 60 days before the scheduled hearing date, each party must give the ALJ a list of witnesses to be offered during the hearing and a statement describing the substance of their proposed testimony, copies of any prior written statements or transcribed testimony of proposed witnesses, a written report of each expert witness to be called to testify that meets the requirements of Federal Rule of Civil Procedure 26(a)(2)(B), and copies of proposed hearing exhibits, including copies of any written statements that a party intends to offer instead of live direct testimony. If there are no prior written statements or transcribed testimony of a proffered witness, the party must submit a detailed factual affidavit of the proposed testimony.

(b) A party may supplement its submission under paragraph (a) of this section until 30 days before the scheduled hearing date if the ALJ determines: (1) There are extraordinary circumstances; and (2) there is no substantial prejudice to the objecting party.

(c) The parties must have an opportunity to object to the admission of evidence submitted under paragraph (a) of this section under a schedule set by the ALJ. However, the parties must file all objections before the final prehearing conference.

(d) If a party tries to introduce evidence after the deadlines in paragraph (a) of this section, the ALJ must exclude the offered evidence from the party's case-in-chief unless the conditions of paragraph (b) of this section are met. If the ALJ admits evidence under paragraph (b) of this section, the objecting party may file a motion to postpone all or part of the hearing to allow sufficient time to prepare and respond to the evidence. The ALJ may not unreasonably deny that motion.

(e) If a party fails to object within the time set by the ALJ and before the final prehearing conference, evidence exchanged under paragraph (a) of this section is considered authentic, relevant and material for the purpose of admissibility at the hearing.

#### **§ 93.514 Amendment to the charge letter.**

(a) The PHS may amend the findings of research misconduct up to 30 days before the scheduled hearing.

(b) The ALJ may not unreasonably deny a respondent's motion to postpone all or part of the hearing to allow sufficient time to prepare and respond to the amended findings.

#### **§ 93.515 Actions for violating an order or for disruptive conduct.**

(a) The ALJ may take action against any party in the proceeding for violating an order or procedure or for other conduct that interferes with the prompt, orderly, or fair conduct of the hearing. Any action imposed upon a party must reasonably relate to the severity and nature of the violation or disruptive conduct.

(b) The actions may include—

(1) Prohibiting a party from introducing certain evidence or otherwise supporting a particular claim or defense;

(2) Striking pleadings, in whole or in part;

(3) Staying the proceedings;

(4) Entering a decision by default;

(5) Refusing to consider any motion or other action not timely filed; or

(6) Taking a negative inference from the absence of research records, documents, or other information.

#### **§ 93.516 Standard and burden of proof.**

(a) The standard of proof is the preponderance of the evidence.

(b) Subject to the rebuttable presumption described in section 93.106(b)(1), ORI bears the burden of proving the PHS findings of research misconduct and the need for any HHS administrative actions, including any debarment or suspension actions.

(c) Once ORI makes a *prima facie* showing of research misconduct, the respondent bears the burden of proving any affirmative defenses raised, including honest error or differences of opinion, and of proving any mitigating factors that the respondent wants the ALJ to consider with respect to the HHS administrative actions.

#### **§ 93.517 The hearing.**

(a) The ALJ will conduct an in-person hearing to decide if the respondent committed research misconduct and if the HHS administrative actions, including any debarment or suspension actions, are appropriate.

(b) The ALJ provides an independent *de novo* review of the PHS findings of research misconduct and HHS administrative actions. The ALJ does not review the procedures or findings of the institution's or ORI's research misconduct proceedings.

(c) A hearing under this subpart is not limited to specific findings and evidence set forth in the charge letter or

the respondent's request for hearing. Additional evidence and information may be offered by either party during its case-in-chief unless the offered evidence is—

(1) Privileged, including but not limited to those protected by the attorney-client privilege, attorney-work product doctrine, or Federal law or regulation.

(2) Otherwise inadmissible under §§ 93.515 or 93.519.

(3) Not offered within the times or terms of §§ 93.512 and 93.513.

(d) ORI proceeds first in its presentation of evidence at the hearing.

(e) After both parties have presented their cases-in-chief, the parties may offer rebuttal evidence even if not exchanged earlier under §§ 93.512 and 93.513.

(f) Except as provided in § 93.518(c), the parties may appear at the hearing in person or by an attorney of record in the proceeding.

(g) The hearing must be open to the public, unless the ALJ orders otherwise for good cause shown. However, even if the hearing is closed to the public, the ALJ may not exclude a party or party representative, persons whose presence a party shows to be essential to the presentation of its case, or expert witnesses.

#### **§ 93.518 Witnesses.**

(a) Except as provided in paragraph (b) of this section, witnesses must give testimony at the hearing under oath or affirmation.

(b) The ALJ may admit written testimony if the witness is available for cross-examination, including prior sworn testimony of witnesses that has been subject to cross-examination. These written statements must be provided to all other parties under § 93.513.

(c) The parties may conduct direct witness examination and cross-examination in person by telephone or audio-visual communication as permitted by the ALJ. However, a respondent must always appear in person to present testimony and for cross-examination.

(d) The ALJ may exercise reasonable control over the mode and order of questioning witnesses and presenting evidence to—

(1) Make the witness questioning and presentation relevant to deciding the truth of the matter; and

(2) Avoid undue repetition or needless consumption of time.

(e) The ALJ must permit the parties to conduct cross-examination of witnesses.

(f) Upon request of a party, the hearing officer may exclude a witness

from the hearing before the witness' own testimony. However, the ALJ may not exclude—

(1) A party or party representative;

(2) Persons whose presence is shown by a party to be essential to the presentation of its case; or

(3) Expert witnesses.

#### **§ 93.519 Admissibility of evidence.**

(a) The ALJ decides the admissibility of evidence offered at the hearing.

(b) Except as provided in this part, the ALJ is not bound by the Federal Rules of Evidence (FRE). However, the ALJ may apply the FRE where appropriate (e.g., to exclude unreliable evidence).

(c) The ALJ must admit evidence unless it is clearly irrelevant, immaterial, or unduly repetitious. However, the ALJ may exclude relevant and material evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence under FRE 401–403.

(d) The ALJ must exclude relevant and material evidence if it is privileged, including but not limited to evidence protected by the attorney-client privilege, the attorney-work product doctrine, or Federal law or regulation.

(e) The ALJ may take judicial notice of matters upon the ALJ's own initiative or upon motion by a party as permitted under FRE 201 (Judicial Notice of Adjudicative Facts).

(1) The ALJ may take judicial notice of any other matter of technical, scientific, or commercial fact of established character.

(2) The ALJ must give the parties adequate notice of matters subject to judicial notice and adequate opportunity to show that the ALJ erroneously noticed the matters.

(f) Evidence of crimes, wrongs, or acts other than those at issue in the hearing is admissible only as permitted under FRE 404(b) (Character Evidence not Admissible to Prove Conduct; Exceptions, Other Crimes).

(g) Methods of proving character are admissible only as permitted under FRE 405 (Methods of Proving Character).

(h) Evidence related to the character and conduct of witnesses is admissible only as permitted under FRE Rule 608 (Evidence of Character and Conduct of Witness).

(i) Evidence about offers of compromise or settlement made in this action is inadmissible as provided in FRE 408 (Compromise and Offers to Compromise).

(j) The ALJ must admit relevant and material hearsay evidence, unless an

objecting party shows that the offered hearsay evidence is not reliable.

(k) The parties may introduce witnesses and evidence on rebuttal.

(l) All documents and other evidence offered or admitted into the record must be open to examination by both parties, unless otherwise ordered by the ALJ for good cause shown.

(m) Whenever the ALJ excludes evidence, the party offering the evidence may make an offer of proof, and the ALJ must include the offer in the transcript or recording of the hearing in full. The offer of proof should consist of a brief oral statement describing the evidence excluded. If the offered evidence consists of an exhibit, the ALJ must mark it for identification and place it in the hearing record. However, the ALJ may rely upon the offered evidence in reaching the decision on the case only if the ALJ admits it.

#### **§ 93.520 The record.**

(a) HHS will record and transcribe the hearing, and if requested, provide a transcript to the parties at HHS' expense.

(b) The exhibits, transcripts of testimony, any other evidence admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for the decision by the ALJ.

(c) For good cause shown, the ALJ may order appropriate redactions made to the record at any time.

(d) The DAB may return original research records and other similar items to the parties or awardee institution upon request after the Assistant Secretary for Health's decision becomes final, unless under judicial review.

#### **§ 93.521 Correction of the transcript.**

(a) At any time, but not later than the time set for the parties to file their post-hearing briefs, any party may file a motion proposing material corrections to the transcript or recording.

(b) At any time before the filing of the ALJ's decision and after consideration of any corrections proposed by the parties, the ALJ may issue an order making any requested corrections in the transcript or recording.

#### **§ 93.522 Filing post-hearing briefs.**

(a) After the hearing and under a schedule set by the ALJ, the parties may file post-hearing briefs, and the ALJ may allow the parties to file reply briefs.

(b) The parties may include proposed findings of fact and conclusions of law in their post-hearing briefs.

**§ 93.523 The Administrative Law Judge's ruling.**

(a) The ALJ shall issue a final ruling in writing setting forth proposed findings of fact and any conclusions of law within 60 days after the last submission by the parties in the case. The ALJ shall serve a copy of the final ruling upon all parties, the Assistant Secretary for Health and the HHS

Debarring Official if debarment or suspension is under review.

(b) If unable to meet the 60-day deadline, the ALJ must set a new deadline and promptly notify all parties, the Assistant Secretary for Health, and the HHS Debarring Official if debarment or suspension is under review.

(c) The final ruling of the ALJ constitutes a recommended decision to

the Assistant Secretary for Health, as set forth in section 93.500(d). The final ruling of the ALJ shall constitute proposed findings of fact to the HHS Debarring Official in accordance with section 93.500(e) and 45 CFR part 76.

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#### **LIST OF PUBLIC LAWS**

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(phone, 202-512-1808). The text will also be made available on the Internet from GPO Access at <http://www.gpoaccess.gov/plaws/index.html>. Some laws may not yet be available.

**H.R. 2584/P.L. 108-219**

To provide for the conveyance to the Utrok Atoll local government of a decommissioned National Oceanic and Atmospheric Administration ship, and for other purposes. (Apr. 13, 2004; 118 Stat. 615)  
**Last List April 14, 2004**

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